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ABSTRACT

The Task Force to Develop Standards and Goals for Juvenile Justice and Delinquency Prevention was initiated in the Spring of 1975 by the Law Enforcement Assistance Administration (LEAA) of the U.S. Department of Justice. The efforts of this task force resulted in nine reports, each one dealing with one aspect of the Juvenile Justice System. This particular volume explores issues regarding the proper role of legal counsel in juvenile proceedings. (Author/FC)

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A COMPARATIVE ANALYSIS OF STANDARDS AND STATE PRACTICES

PROSECUTION AND DEFENSE

VOLUME VIII OF IX

National Institute for Juvenile Justice and Delinquency Prevention

Office of Juvenile Justice and Delinquency Prevention

Law Enforcement Assistance Administration

U.S. Department of Justice

2

CG 012590

A COMPARATIVE ANALYSIS OF
STANDARDS AND STATE PRACTICES

PROSECUTION AND DEFENSE

VOLUME VIII OF IX

Working Papers of the National Task Force
to Develop Standards and Goals for Juvenile
Justice and Delinquency Prevention

Prepared under Grant Number 75-TA-99-0016 from the National Institute for Juvenile Justice and Delinquency Prevention, Law Enforcement Assistance Administration, U.S. Department of Justice.

Points of view or opinions stated in this document are those of the author and do not necessarily represent the official position or policies of the U.S. Department of Justice.

National Institute for Juvenile Justice and
Delinquency Prevention

Office of Juvenile Justice and
Delinquency Prevention

Law Enforcement Assistance Administration

U.S. Department of Justice

PREFACE TO WORKING PAPERS

Task Force Origin and Mission

The National Task Force to Develop Standards and Goals for Juvenile Justice and Delinquency Prevention was initiated as part of Phase II of the standards and goals effort undertaken by the Law Enforcement Assistance Administration (LEAA) of the U.S. Department of Justice.

The original portion of this effort (Phase I) led to the establishment of the National Advisory Commission on Criminal Justice Standards and Goals in October of 1971. To support the work of the National Advisory Commission, special purpose Task Forces were created, each concentrating on a separate area of concern in criminal justice. The efforts of the Task Forces resulted in the completion of five reports: Courts; Police; Corrections; Criminal Justice System; and Community Crime Prevention. In addition, the National Advisory Commission itself produced an overview volume entitled A National Strategy to Reduce Crime. Following the completion of these works in 1973, the National Advisory Commission was disbanded.

In the Spring of 1975, LEAA established five more Task Forces coordinated by a newly created National Advisory Committee to carry out the work of Phase II. The five Task Forces were Private Security; Organized Crime; Civil Disorders and Terrorism; Research and Development; and, of course, the Task Force to Develop Standards and Goals for Juvenile Justice and Delinquency Prevention.

From the beginning there was a recognition that the work of the Juvenile Justice and Delinquency Prevention Task Force was much broader than the other four groups. The charge of the Juvenile Justice Task Force was to supplement virtually all of the work of the Phase I National Advisory Commission with a "juvenile" version of the original adult-oriented standards and goals statements.

In all, the Task Force met ten times, for two or three days each time, in public meetings in various parts of the nation. At these meetings the Task Force was able to solidify its group philosophy, analyze the issues of importance in juvenile justice and delinquency prevention, direct the writing of standards and commentaries, review and modify draft material, and react to National Advisory Committee recommendations. The final results of the Task Force's efforts are set forth in the forthcoming volume on Juvenile Justice and Delinquency Prevention , soon to be published by LEAA.

Throughout its work process, the Task Force had the benefit of staff assistance. The American Justice Institute (AJI) of Sacramento, California, received a grant from LEAA to support the work of the Task Force.

Task Force Working Procedures and Use of Comparative Analyses

The time and resources provided to accomplish the challenging task of producing the standards volume did not allow the Task Force to conduct new research in juvenile justice and delinquency prevention. However, the Task Force did utilize a methodology which assured the incorporation of the best scholarship and state-of-the-art knowledge currently available.

This methodology involved identifying the major issues or questions which needed to be resolved before the Task Force could promulgate standards. Comparative Analyses were then constructed around each of these issues. Each Comparative Analysis begins with a comparison of the positions taken on the issue by other standard-setting organizations--previous Task Forces, Commissions, etc. The Comparative Analyses also consider the current practice of each state with regard to the issue in question.

These background materials were designed not only to make Task Force members aware of the various positions that had been taken with regard to a particular issue, but also to provide the Task Force with a complete analysis of the arguments for and against the full range of options presented.

Using the Comparative Analyses as a basis for its discussion and deliberation, the Task Force then directed the staff and consultants to prepare standards and commentaries in line with the positions which it took in each of these areas. This process proved to be very productive for the Task Force members. It allowed informed consideration of the pertinent issues prior to the adoption of any particular standard.

Compilation of Working Papers

Following completion of the Task Force's work, it was clear to members of the AJI staff and officials at LEAA that the Comparative Analyses prepared to assist the Task Force in its preparation of the standards volume could be useful to other groups. In particular, it was recognized that states and localities which plan to formulate standards or guidelines for juvenile justice and delinquency prevention will need to traverse much of the same territory and address many of these same questions. As a result, LEAA's National Institute for Juvenile Justice and Delinquency Prevention provided the AJI staff with a grant to compile the materials in their present form.

The Comparative Analyses have been organized in a series of nine volumes of Working Papers, each devoted to a particular aspect of juvenile justice and delinquency prevention. (A complete table of contents of each of the volumes is set forth in the appendix.) Some subjects have been analyzed in considerable detail; others, because of limited time or consultant resources, have been given abbreviated treatment. Thus, while it is recognized that these Working Papers do not present a comprehensive examination of all of the important issues in juvenile justice--or even of all of the issues considered by the Task Force--they do represent a useful survey of a wide range of subjects, with a wealth of data on many of the particulars. Using these materials as groundwork, other groups with interests in individual facets of the juvenile system may wish to expand the research as they see fit.

Although the Comparative Analyses should not be taken to represent the Task Force's views--they were prepared by project consultants or research staff and were not formally approved by the Task Force or reviewed by the National Advisory Committee--it was decided that it would be helpful to outline the position taken by the Task Force on each of the issues. Therefore, the AJI staff reviewed each of the Comparative Analyses and added a concluding section on "Task Force Standards and Rationale" which did not appear in the materials when they were considered by the Task Force.

A more thorough exposition of the Task Force's views can be found in the forthcoming volume on Juvenile Justice and Delinquency Prevention, which should, of course, be consulted by those considering these Working Papers.

The efforts of the many consultants and research assistants who prepared the drafts of these materials is gratefully acknowledged. Any errors or omissions are the responsibility of the American Justice Institute, which reviewed the materials and assembled them in their present form.

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FOREWORD

Over the past ten years, a number of national efforts have developed regarding juvenile justice and delinquency prevention standards and model legislation. After the enactment of the Juvenile Justice and Delinquency Prevention Act of 1974 (Pub. L. 93-415) and in conjunction with LEAA's Standards and Goals Program, many States started formulating their own standards or revising their juvenile codes.

The review of existing recommendations and practices is an important element of standards and legislative development. The National Institute for Juvenile Justice and Delinquency Prevention (NIJJDP) has supported the compilation of the comparative analyses prepared as working papers for the Task Force to Develop Standards and Goals for Juvenile Justice and Delinquency Prevention in order to facilitate this review. Over one hundred issues, questions, and theories pertaining to the organization, operation, and underlying assumptions of juvenile justice and delinquency prevention are covered in the analyses. These are divided into nine volumes: Preventing Delinquency; Police-Juvenile Operations; Court Structure; Judicial and Non-Judicial Personnel and Juvenile Records; Jurisdiction-Delinquency; Jurisdiction-Status Offenses; Abuse and Neglect; Pre-Adjudication and Adjudication Processes; Prosecution and Defense; and Juvenile Dispositions and Corrections.

The materials discussed in these reports reflect a variety of views on and approaches to major questions in the juvenile justice field. It should be clearly recognized in reviewing these volumes that the conclusions contained in the comparative analyses are those of the Task Force and/or its consultants and staff. The conclusions are not necessarily those of the Department of Justice, LEAA, or NIJJDP. Neither are the conclusions necessarily consistent with the recommendations of the Advisory Committee on Standrds that was established by the Act, although the Committee carefully considered the comparative analyses and endorsed many of the positions adopted by the Task Force.

Juvenile justice policies and practices have experienced significant changes since the creation of the first juvenile court in 1899. The perspective provided by these working papers can contribute significantly to current efforts to strengthen and improve juvenile justice throughout the United States.

James C. Howell
Director
National Institute for Juvenile Justice
and Delinquency Prevention
January, 1977

INTRODUCTION

Volume VIII: Prosecution and Defense

The materials in this volume explore a number of important issues regarding the proper role of legal counsel in juvenile proceedings. The volume is divided into two parts: the first examines the role of the prosecuting attorney in the family court; the second focuses on defense counsel for family court clients.

The section on prosecution consists of six Comparative Analyses. The first issue discussed is the appropriate organizational structure for family court prosecution services. Next, the questions of at what stages in which proceedings the prosecutor should be present, is analyzed. The third Comparative Analysis considers whether the prosecutor should engage in plea discussions in juvenile proceedings, and, if so, to what extent.

The appropriate division of responsibility between the prosecutor and intake personnel, and the question of whether the prosecutor should have final responsibility concerning the filing of a petition are considered next. The following Comparative Analysis explores an issue important to all aspects of juvenile proceedings. This is the question of the proper role of the prosecutor in juvenile proceedings. Should he assume a traditional adversary role? Or is some other role more appropriate? The final paper in this section addresses the responsibilities of the prosecutor in dispositional proceedings and monitoring the effectiveness of dispositions.

The materials on defense counsel appear in a somewhat different format. Comparative Analyses on individual issues were not prepared on this subject. Instead, there is a single Memorandum which highlights a number of the critical issues in this area, together with an Attachment discussing alternative role definitions for counsel in juvenile proceedings. The Memorandum and the Attachment consider at some length the issue of whether defense counsel should assume a traditional adversary posture or some other role, e.g., one of "guardianship" or amicus curiae. The Memorandum also focuses on communications between the attorney and his juvenile client. In addition, a number of issues regarding availability of counsel are examined: In what proceedings should counsel be made available? At what stages? To whom?

A short appendix regarding petitions completes the volume. It briefly highlights a number of issues related to the content and filing of petitions in juvenile proceedings.

Acknowledgements are gratefully made to Mr. James Manak of the National District Attorney's Association, who originally prepared

the material on prosecution; to Professor Lee Teitelbaum of the University of New Mexico School of Law, who drafted the Memorandum of defense counsel; and to the Honorable Ted Rubin, who prepared the Appendix. The sections on "Task Force Standards and Rationale" were, however, inserted at a later time by the AJI staff. And all of the materials were revised and assembled in their present form by the American Justice Institute, which bears responsibility for any errors or omissions.

1. Issue Title: Specialization--Should the juvenile prosecutor be a separate and specialized prosecutorial unit in each prosecutor's office, where warranted by size, and should he have a well-trained professional and non-professional staff adequate to handle all juvenile cases within his jurisdiction?

2. Description of the Issue:

The basic issue is one of specialization and semi-autonomy, i.e., should the attorney who represents the State in juvenile proceedings be a specialist in terms of qualifications, training, and interest, and should he have a fully adequate staff to perform his duties?

3. Summary of Major Positions:

Other than a variety of existing state practices, and a recommendation by one Standard Group (see, infra), there are no articulated major positions on the subject. The options, however, are relatively clear. Either the office of juvenile prosecutor must be structured to fit the needs of the community, or it will remain a hodge-podge of loose practices, such as presently exists, where the office is frequently filled by inexperienced or uninterested attorneys having little real expertise in handling juvenile matters.

4. Summary of State Practices:

In virtually every state, the attorney who represents the interests of the State in Juvenile proceedings is a member of the staff of the local prosecuting attorney, whether the title be State's Attorney, Prosecuting Attorney, District Attorney, County Attorney, Commonwealth's Attorney, Solicitor, etc. Unless the office is of sufficient size to warrant a separate attorney or division devoted exclusively to juvenile and/or other family law matters (such as support law enforcement, paternity, etc.) the attorney usually divides his time between criminal prosecution duties, or civil duties, and his juvenile caseload. Some states charge the county or city attorney with the duty to prosecute juvenile cases, rather than the local prosecuting attorney who has primarily criminal duties.

5. Summary of Positions Recommended by Standards Groups:

The President's Task Force Report of 1967 discourages the use of a public prosecutor in juvenile court on the asserted basis that it would be too great a departure from the spirit of the court and opts for the use of a government attorney who has primarily civil duties such as a corporation counsel or an attorney representing the welfare department.[2] However, this position was taken at the threshold of a revolution in the juvenile court ushered in by In re Gault.[3] In light of the trend towards greater formality as well as expansion of due process rights in the context of the juvenile court, it is doubtful that the Task Force would take the same position today.

The recommendation of the IJA/ABA (1975) Juvenile Justice Standards Project is as follows:

1. In each local prosecutor's office in which there are approximately six attorneys, there would be a separate unit or attorney devoted to the representation of the State in juvenile court. The attorney in charge of such a unit would be known as the "Juvenile Prosecutor."

2. The Juvenile Prosecutor would have a professional staff adequate to handle all juvenile court cases in his jurisdiction, as well as clerical workers, para-legal workers, law student interns, investigators, and police liaison officers. Such staff would be separate and distinct from those in the prosecutor's office who handle adult criminal cases.

3. The Juvenile Prosecutor would, if possible, be employed on a full-time basis. It would be preferred that assistant Juvenile Prosecutors also be employed on a full-time basis. The clerical staff would, if possible, be employed on a full-time basis. Para-legal workers and/or law student interns could be employed on a part-time basis.

4. The salary of the Juvenile Prosecutor and his professional staff would be commensurate with that paid by leading law firms in the community.

5. The Juvenile Prosecutor would be an assistant prosecutor, appointed by and responsible to the local prosecutor.

6. The Juvenile Prosecutor would be an attorney, selected on the basis of interest, education, experience and competence. He would have prior criminal prosecution or other trial experience.

7. The professional staff of the Juvenile Prosecutor's office would be appointed by the local prosecutor, using the same criteria utilized in selecting the Juvenile Prosecutor.

8. The staff would represent, as much as possible, a cross-section of the community, including minority groups.

9. There would be an orientation and training program for the Juvenile Prosecutor and for every new assistant before each assumes his office or duties.

10. There would be a program of on-going, in-service inter-disciplinary training of both professional and non-professional staff in the philosophy and intent of the juvenile court, the problems of young people, the problems and conflicts within the community, and the resources available in the community.

11. Within each state-wide organization of prosecuting attorneys there would be a division whose membership would be composed of every Juvenile Prosecutor within the state. This division would coordinate training programs and establish and maintain uniform standards for the adjudication and disposition of juvenile court cases. This division would also establish an advisory council of Juvenile Prosecutors, which should provide prompt guidance and advice to Juvenile Prosecutors seeking assistance in their efforts to comply with standards of professional conduct.

6. Analysis of the Issue:

It is recognized at the outset that the goal of specialization is largely unattainable for the smaller, i.e., one- or two-attorney prosecution offices in rural areas. Still, as recognized by the IJA/ABA Standards, it may be a goal that all prosecution offices may strive for, in whole or in part.

Many reasons exist for encouraging specialization in the prosecution function in juvenile court. First, specialization will lead to the development of expertise by prosecuting attorneys working exclusively in the area of juvenile justice. Second, there is less likelihood that role confusion will occur if a prosecutor devotes his time exclusively to juvenile court matters. If prosecutors handle both juvenile and adult criminal cases simultaneously, they are less likely to remember that while they represent the interests of the State, they also must not lose sight of the philosophy and purpose of the juvenile court in insuring the best interests

of the youth. Third, a more consistent policy of handling juvenile and family matters is likely to evolve if this is accomplished by one unit. Finally, the monitoring of the effectiveness of various modes of disposition and the interaction between the prosecution authority and the community regarding juvenile justice are more likely to occur if a separate unit handles juvenile and family cases exclusively.

It is highly desirable that the juvenile prosecutor have a staff of his own, distinct from the staff of the adult prosecutor. It is to be expected that the members of the staff will develop expertise in the processing of juvenile and family cases. While the juvenile prosecutor should have at least one investigator at his exclusive disposal, there may be times when his own staff is inadequate in number or not experienced or knowledgeable in a particular area. When one of these situations arises, the juvenile prosecutor should have access to the local prosecutor's investigative staff. Again, the size of the jurisdiction, the prosecutorial office, and the circumstances of the community would have to be considered.

It is probably desirable that the juvenile prosecutor include on his staff one or more police liaison officers. Cooperation between the police and the juvenile prosecutor is essential to the successful representation of the State's interests in juvenile court, and it is probable that the utilization of a police liaison officer would go far toward establishing and maintaining a smooth working relationship between these two offices. The candidate for such a position could include among his credentials experience as a police officer. However, again it is likely that in smaller jurisdictions the employment of such a person may be impractical. In any event, the juvenile prosecutor should be encouraged to strive to establish and maintain a smooth working relationship between his office and the police.

If the juvenile prosecutor and his professional staff are employed on a full-time basis this will help to avoid conflicts of interest. In jurisdictions in which the local prosecutor is employed on a full-time basis, the juvenile prosecutor may be employed on a part-time basis, if the caseload does not warrant a full-time attorney. The juvenile prosecutor should probably be an assistant prosecutor, appointed by and responsible to the local prosecutor, rather than the juvenile court.

The use of para-legal workers, and particularly of law student interns, should be considered by the Task Force. Para-legal workers and law student interns would be able to perform some of the simpler and more routine tasks in the office, conserving the time of the juvenile prosecutor, allowing him to concentrate on more complex and major problems. In addition, by using law student interns, interest, concern and expertise in the field of juvenile justice would be fostered. Graduates of law schools who intern with a juvenile

prosecutor may contribute significantly to the upgrading of the entire juvenile justice system.

If the premise that the juvenile prosecutor should be full-time is accepted by the Task Force, a logical corollary would seem to be that his salary, as well as that of his staff, should be at such a level as to substantially reduce the temptation to assume extra work outside the office. Such remuneration should also contribute to fostering the ideal of careerism in the juvenile prosecutor. The IJA/ABA Standard provides that salaries should be commensurate with those paid by the leading law firms in the community. Such a pay scale would attract those who are best qualified for their positions. It would obtain and retain respect for the position throughout the bar and the community as a whole. It would also aid in maintaining continuity of personnel in the office, and thus serve to preserve in the office the expertise that has been acquired by the personnel working therein. The drive to accept another position, or to enter private practice, because of the need or desire for an increase in income, would diminish.

Should the juvenile prosecutor be a separate unit or division of the local prosecutor's office? The President's Task Force Report expresses the belief that "Using a public prosecutor may be too great a departure from the spirit of the juvenile court," and suggests the use of the corporation counsel or an attorney from the welfare department.[4] As noted, supra, some states presently charge the county or city attorney with the duty to prosecute juvenile cases.[5] However, the Task Force should consider whether these offices would be equipped to handle more serious cases since, by and large, their functions tend more toward civil than criminal cases. By making the juvenile prosecutor part of the local prosecutor's office, cooperation and coordination between them would be greatly facilitated. Among other things, it would facilitate the handling of cases transferred to the criminal courts. Furthermore, it may be best for the juvenile prosecutor to be responsible for prosecuting only those cases in which a youth is the respondent (e.g., delinquency, PINS, truancy, etc.) leaving the prosecuting of adults (e.g., neglect cases, contributing to the delinquency of a minor cases, etc.), to a different government attorney.

The criteria used to select the juvenile prosecutor are extremely important. The first possible criterion - interest - is perhaps the most subjective of any. Ideally, the candidate should express an interest in criminal and family law, and in working with children. Beyond this, interest can probably best be evaluated through an examination of the candidate's education and experience.

A second possible criterion is education. This has two facets: legal and general. The juvenile prosecutor should possess an LL.B or J.D. degree. In addition, however, should the juvenile prosecutor

possess an undergraduate or graduate degree in a discipline which indicates an exposure to and interest in community and children's problems? Thus, a candidate with an undergraduate or graduate course of study in psychology or sociology might be preferred over a candidate whose education consists in a course of study of accountancy or engineering. A candidate whose educational background indicates a specialization in the problems of children would present even stronger educational credentials than either of the former.

A third possible criterion is experience. This springs from the belief that the juvenile prosecutor should not be an entry-level position in the legal profession. If the juvenile prosecutor is in a large jurisdiction, he may have attorney assistants working under him so that, as a division chief, he should possess experience sufficient to enable him to advise his assistants. Even if the jurisdiction is of such a size that only one attorney will be assigned to juvenile matters, that attorney should possess sufficient experience so as to be able to perform his job competently and independently. The juvenile prosecutor should have prior criminal prosecution or other trial experience. In addition, experience working with children (e.g. teacher, summer camp counselor) is also desirable.

A fourth possible criterion is competence. This is basically a function of experience. It may be considered independently to underscore the point that the experience which a candidate brings must be good experience. The local prosecutor should be encouraged to check the references of an applicant to ascertain whether or not the applicant has performed well in the past positions that he has held.

As general propositions, these criteria may appear obvious. However, the Task Force may wish to set them forth in Standards to offer some direction in the selection process. Their listing could be illustrative rather than exclusive. Depending on the composition of the community, other criteria may also be relevant. For example, the local prosecutor in a small community may feel that length of residence in the community is an important factor to be considered in the selection process, while in a larger community this factor may not be deemed to be of great importance. In any event, no attempt should probably be made to evaluate the suggested criteria in terms of their relative importance. That judgment should probably be left to the local prosecutor responsible for the selection of the juvenile prosecutor.

Other "factors" may be considered in the process of selecting a juvenile prosecutor if they are relevant to a determination of the needs of the community served by the juvenile prosecutor. Examples of such "factors" are sex, race, and ethnic heritage.

If the juvenile prosecutor is a unit of the local prosecutor's office who serves at the pleasure of the local prosecutor, it would be logical to provide that his professional staff also be appointed by the local prosecutor. Since the juvenile prosecutor would be a specialist in the field of juvenile and family law, he, rather than the local prosecutor, would be more likely to have knowledge of the strengths and weaknesses in the backgrounds of applicants for the various professional staff positions in his office. This would seem to be especially true in the larger jurisdictions. In such situations, the local prosecutor may be content to delegate the making of employment decisions in the juvenile unit or division to the juvenile prosecutor, reserving to himself only a veto power. On the other hand, the local prosecutor may desire to take a more active role in the employment decision-making process. A Standard need not take a firm position regarding the allocation of the power to employ and dismiss the professional staff of the juvenile prosecutor as between the local prosecutor and the juvenile prosecutor. This matter may be left to be worked out between these two individuals. A Standard could emphasize, however, that the ultimate responsibility for the competence and performance of the professional staff of the juvenile prosecutor's office rests with the local prosecutor. Generally, the local prosecutor is an elected public official, so that lodging the responsibility for the performance of the juvenile prosecutor in him will provide at least indirect community control over the performance of that office. Since he is responsible for the performance of that function, the local prosecutor must have the power to effectively control its operations. Giving him the ultimate control over the employment of the professional staff of the juvenile unit or division would give him sufficient authority to discharge that responsibility.

Should the Task Force recommend in its Standard that each member of the professional staff of the juvenile prosecutor have background training in social work, working with children and the particular problems of the community he serves?

Should the Task Force recommend in its Standard that the political affiliation of an applicant for any position, of whatever rank, in the juvenile prosecutor's unit or division, be an irrelevant criterion? The staff, particularly those members of the staff who will come in direct contact with young people and the community as a whole, should include minority groups. This would bring to the juvenile prosecutor a greater awareness and understanding of the problems of the total community. It might also aid in the prevention of delinquency and the rehabilitation of delinquents among minority children, in that they may feel that the "system" is not loaded against them if they see that other minority group members have "made it" on the juvenile prosecutor's staff. The term "minority group" should probably be defined to include the major racial and ethnic groups present within the community.

The orientation and training of juvenile prosecutors could be accomplished by a state-wide organization of juvenile prosecutors. If a state has a State Prosecutor Training Coordinator, both initial and continuing training programs should probably be administered in conjunction with that office.

Non-professional members of the juvenile prosecutor's staff should probably also undergo an orientation and training program upon the assumption of their positions, and also participate in a continuing program of training in the philosophy and purpose of the juvenile court, the problems of young people, the problems and conflicts within the community, and the resources available in the community. Such training could lead to the realization by each employee of the importance of the proper performance of the responsibilities of his or her position, and thus lead to an increase in both job satisfaction and job efficiency. Staff turnover would also be reduced. The precise nature and extent of the training to be given to the non-professional would depend upon the nature of the duties to be performed. However, both the initial and the continuing training that each staff member receives should probably encompass much more than the nature of the duties of the particular position.

The Task Force may wish to consider the establishment of an advisory council of juvenile prosecutors which would render advice and guidance to any juvenile prosecutor within the state who encounters a problem involving compliance with standards of professional conduct. Such problems often arise in the areas of publicity or conflicts of interests. They also arise in areas such as improper conduct in the examination of witnesses and improper argument to the jury (in those states which provide for a jury trial in juvenile court proceedings).

7. Task Force Standards and Rationale:

The Task Force focused on the issues raised in this Comparative Analysis in a series of six Standards: three relating principally to the Family Court Prosecution and the organization of his office; three relating primarily to the Family Court Prosecutor's staff.

Standard 15.1: In each local prosecutor's office in which there are at least six attorneys, there should be a specialized division or attorney devoted to the representation of the state in family court. The attorney in charge of this unit should be known as the Family Court Prosecutor.

Standard 15.2: The Family Court Prosecutor should, if possible, be employed on a full-time basis. It is preferred that assistant Family Court Prosecutors also be employed on a full-time basis. The clerical staff should, if possible, be employed on a full-time basis. Para-legal workers and law student interns may be employed on a part-time basis.

The salary of the Family Court Prosecutor and his attorney

staff should be commensurate with that paid attorneys in other public agencies.

Standard 15.3: The Family Court Prosecutor should be an attorney admitted to practice before the highest court in the state, selected on the basis of interest, education, experience and competence. He should have prior criminal prosecution or other trial experience.

The Task Force felt that vesting responsibility for family court prosecutorial duties in a specialized division or attorney, wherever the workload permits would help avoid perpetuating the criminal aspects of the local prosecutor's role in family court proceedings. Moreover, the Task Force believed that this approach would tend to attract qualified and interested attorneys to the office and help to avoid conflicts of interest. The qualifications criteria, the preference for full-time assignment and the stipulation that the Family Court Prosecutor and his attorney staff be compensated at a level commensurate with that paid attorneys in other public agencies are likewise intended to foster the ideal of careerism in family court prosecution services.

The three Standards that focus principally on the Family Court Prosecutor's staff are the following:

Standard 15.4: The Family Court Prosecutor should have a professional staff adequate to handle all family court cases in his jurisdiction, as well as clerical workers, para-legal workers, law student interns, investigators, and police liaison officers. Where practicable, such staff should be in a separate and distinct organizational unit from those prosecutors who handle adult criminal cases.

Standard 15.5: The Family Court Prosecutor's staff should be selected by using the same general criteria utilized in selecting the Family Court Prosecutor.

The staff should represent, as much as possible, a cross section of the community, including minority groups.

Standard 15.6: There should be an orientation and training program for the Family Court Prosecutor and for every new assistant before each assumes his office or duties.

There should be an interdisciplinary program of ongoing, in-service training of both professional and non-professional staff in the philosophy and intent of the family court, the problems of young people, the problems and conflicts within the community, and the resources available in the community.

These Standards are logical corollaries to the specialized, semi-autonomous organizational structure proposed above. In general, they are all designed to encourage the development of family law expertise and professionalism in the supporting staff.

Footnotes:

[1]See, e.g., Ariz. Rev. Sta. Ann. 8-233 (supp. 1973); Iowa Code Ann. 232.29 (West 1969); Rev. Code Mont. 10-629 (2d Rep. Vol. 1968).

[2]President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Juvenile Delinquency and Youth Crime (1967), p. 34.

[3]387 U. S. 1 (1967).

[4]Supra note 2.

[5]Supra note 1.

1. Issue Title: Representation of the State's Interests--Should an attorney for the State, which we may call the juvenile prosecutor, be present at each stage of every proceeding in the juvenile court in which the State has an interest, including detention, waiver, adjudication, disposition, revocation of probation or parole status, appeals, and collateral attacks upon decisions in these proceedings?

2. Description of the Issue:

For many years the interests of the State in juvenile proceedings were represented by a probation officer, social worker, police officer, or private citizen presenting evidence on a petition, rather than an attorney for the State. The issue is whether such an attorney should represent the State's interests in all such cases.

3. Summary of Major Positions:

Other than a variety of existing state practices, and a recommendation by two Standard Groups (see, infra), there are no articulated major positions on the subject.

The options are to have representation for the State in some or all of the stated functions; to have State representation turn upon the presence or lack of presence of counsel for the child, or to have no representation for the State.

One reason for the apparent lack of attention to the issue in the literature is that, until recently, appearances by any attorney, whether prosecution or defense, were infrequent in the juvenile court. The proceedings, for better or worse, were informal in nature. The juvenile court was not looked upon as a formal court of criminal law in which the State presented its evidence against the defendant, who, if adjudicated guilty, might be sentenced to a term in prison. Rather, the juvenile court was viewed as an institution which rendered aid and assistance to a youth whose conduct or circumstances indicated a need for external intervention. A finding by a juvenile court judge that a youth had committed acts or engaged in a course of conduct considered inappropriate by the State, was not an adjudication of guilt. Rather, it was a declaration of status, i.e., that the child was "delinquent," or "in need of supervision." This difference in terminology was of greater social significance earlier in the twentieth century than today. It is indicative, however, of a difference of philosophy and purpose of the juvenile court from that of the criminal court.

In an effort to accommodate the beneficent tone of the juvenile court and to project an image different from the penal atmosphere of

adult criminal proceedings, juvenile court proceedings assumed an informal atmosphere. The judge, rather than an impartial arbitrator between two adversaries, became the representative of all parties in interest to the proceeding. It was his responsibility to determine both the best interests of the State and the youth, seeking to reconcile any differences in interest between these two parties. The judge exercised a great amount of discretion in determining what was in the "best interests" of the youth.

One serious disadvantage to the informality of the system, however, was that if the juvenile court judge were prone to act arbitrarily, neither counsel for the youth nor for the State were present to exercise a restraining influence upon him. The absence of a formal record of the proceedings rendered appellate review virtually impossible. Increasing attacks on the system by aggrieved youths on the grounds that many of its facets did not comport with the fundamental fairness required by the due process clause of the Fourteenth Amendment began to bear fruit in the 1960's.

The leading case in this area, and the one most germane to a discussion of the role of the attorney representing the State's interests in the juvenile court, is In re Gault.[1] There, the Supreme Court declared that a youth has a right to have independent counsel in juvenile court, that he has a right to have counsel appointed to represent him if he is indigent, and that he must be advised of these rights. The informal, non-adversary nature of juvenile court proceedings was necessarily altered by this decision. No longer could an adjudicatory proceeding in the juvenile court be considered non-adversarial. The youthful respondent was now entitled to the vigorous representation of his interests by his attorney. Many states, however, slow to abandon the informal, non-adversarial nature of their juvenile court proceedings, either made no provision for the representation of the State's interests in this court by its own attorney, or limited the appearance of an attorney for the State to situations in which the juvenile court judge requested his presence. The result of this state of affairs has been a lack of vigorous, effective representation of the State's interests in the juvenile courts of many states.

4. Summary of State Practices:

Until recently, in many states there were either no statutory provisions for a prosecuting attorney in juvenile court proceedings, or prosecuting attorneys simply did not appear. With the advent of counsel for the youth, this situation is changing. It is expected that statutory revision will require a juvenile prosecutor who will assume an active role in all phases of the juvenile justice system.

Many states which presently make provision for a prosecutor in juvenile court, limit his appearance in the juvenile court to appearances "at the request" of the juvenile court judge,[2] or only when

the youth is represented by counsel.[3]

A 1972 survey of 68 major American cities conducted by the Center for Criminal Justice, Boston University School of Law, found that in 38.2% of the cities surveyed, a public prosecutor represented the State at a detention hearing; in 11.8% he was authorized to file a petition; in 22.1% he prepared the petition; in 36.8% he reviewed the petition for legal sufficiency; in 8.8% he signed the petition; in 76.5% he represented the State at pre-trial motions; in 73.5% he represented the State at probable cause hearings; in 45.6% he conducted the pre-trial negotiations for the State; in 47.1% he could request that a juvenile be bound over; in 76.5% he represented the State at bind-over hearings; in 2.9% he could request a physical or mental examination of the juvenile; in 22.1% he had authority to amend a filed petition; in 44.1% he could move for dismissal of a filed petition; in 72.1% he represented the petitioner at adjudication hearings; in 48.5% he represented the petitioner at disposition; in 67.6% he conducted the examination of witnesses; in 8.8% he recommended disposition of the judge; in 69.1% he represented the petitioner on appeal; in 72.1% he represented the State in habeas corpus proceedings; and in 30.9% he presented the case on an alleged probation violation. Where these functions were not performed by the prosecutor they were performed at various times by clerks, non-attorney prosecutors, probation officers or judges.

5. Summary of Positions Recommended by Standards Groups:

The President's Task Force Report of 1967 discourages the use of a public prosecutor in juvenile court on the basis that it may introduce an adversary atmosphere and would be too great a departure from the "spirit" of the court.[5]

The IJA/ABA (1975) Juvenile Justice Standards Project recommends that an attorney for the State, referred to as the "juvenile prosecutor", should participate in every proceeding of every stage of every case subject to the jurisdiction of the juvenile court, in which the State has an interest, including detention, waiver, adjudication, and disposition. They further provide that such an attorney may appear and present evidence in revocation of probation or parole status and any appeals from, or collateral attacks upon, decisions rendered in any of these proceedings.

6. Analysis of the Issue:

Prior to In re Gault,[6] the youth's constitutional right to representation by counsel was not recognized by most courts. After the Supreme Court declared in that case that a youth not only has a right to retained counsel in juvenile court, but also many have counsel appointed if he is indigent and must be so advised, the number of

attorneys appearing in juvenile courts on behalf of the youth greatly increased. However, the interest of the State has generally remained underrepresented and there has frequently been no legally trained person capable of competently presenting the evidence on juvenile court petitions, other than the judge. Often, a probation officer has been placed in the untenable position of presenting evidence against the youth while, at the same time, counseling him as a "friend" before and after the adjudicatory hearing. Almost invariably, the probation officer was not trained in the law, and he simply could not match the advocacy of the youth's attorney. Furthermore, he was unable to make or answer motions or objections, and the judge was forced by those circumstances to intervene, often destroying the court's impartiality in the matter, or at least his appearance of impartiality as far as the youth and his parents were concerned.

The need for a prosecuting attorney to present the evidence on the petition and to avoid the judge's conflict in roles was noted in Matter of Lang[7] as a necessary response to the establishment of the Law-Guardian in the New York Family Court Act (1963). At the national level, a survey of juvenile court judges in the one hundred largest cities in the country found that most favored an active prosecuting attorney "to maintain adversary balance in their courts."[8]

While many believe that the participation of a prosecuting attorney in juvenile cases will destroy the informality of the proceedings, it is doubtful that this would be a serious loss. It has been stated that greater formality in the proceedings may be beneficial to rehabilitation and may impress upon the juvenile the seriousness of the proceeding.[9] The presence of a prosecutor will eliminate the conflict of roles for the judge, the probation officer, the police officer, and the youth's attorney. His presence will undoubtedly help to impress upon the youth the seriousness of the proceeding, should expedite the proceedings through careful investigation and marshalling of evidence, and will also enhance the accuracy and documentation of social and probation reports through timely and effective challenge, when deemed necessary by the prosecutor.[10] Furthermore, the presence of a skilled, professional prosecutor will compel defense attorneys to upgrade the representation of their clients.[11]

Should the juvenile prosecutor, rather than the local prosecutor or other government attorney, handle all appeals from judgments of the juvenile court? Since, presumably, he will be more familiar with the applicable juvenile law, he may be in a better position to represent the State's interest in appellate litigation. Having previously handled the case in the juvenile court, he will be more familiar with the record. Problems of coordination with the local prosecutor could be avoided. Finally, the juvenile prosecutor would be better able to formulate and administer a uniform policy in dealing with juvenile conduct if he controls appellate litigation. Similar policy reasons are at least equally compelling when applied to hearings concerning the revocation of probation or parole, the modification of disposition and all subsequent collateral attacks allowed by the rules of procedure

of the particular jurisdiction. For the same reasons, the juvenile prosecutor may be expected to represent the State's interests in any appeal from a decision concerning the waiver of juvenile court jurisdiction. A Standard could be drawn to take into consideration the fact that present lines of jurisdiction and authority among government counsel would of necessity have to be adjusted to permit the juvenile prosecutor to engage in all post-disposition proceedings.

On the other hand, it should also be recognized that smaller jurisdictions may not be able to effectuate such a localization of functions in their offices. The latter jurisdictions may prudently elect to have all appellate and other post-disposition litigation handled by a state-wide office such as the attorney general. Advantages to the centralization of such litigation include a uniformity of the quality of appellate and other post-disposition advocacy throughout the State, and the feasibility of the creation of a centralized system of research collection to minimize the duplication of research effort.[12] A jurisdiction may properly conclude that, given its particular circumstances, a centralization of appellate and/or other post-trial litigation may be better suited to its needs and resources. In other cases, the use of regional system of handling appellate and other post-trial litigation may enable jurisdictions to obtain some of the benefits of centralization without losing a substantial amount of the benefits of localization. Thus, while a Standard could express a preference for the localization of post-disposition litigation in the juvenile prosecutor's office, each State should probably be encouraged to adopt whichever model it believes is most appropriate.

7. Task Force Standards and Rationale:

The Task Force addressed this issue in Standard 15.7.

> An attorney for the state, referred to as the family court prosecutor, may participate in every proceeding of every stage of every case subject to the jurisdiction of the family court, in which the state has an interest. The family court prosecutor shall determine which cases and proceedings he shall appear and participate in, except that he may be ordered to appear and participate in such cases and proceedings as determined by the family court in the exercise of its discretion.

The commentary to the Standard highlights a number of the advantages which the Task Force felt would accrue from effective representation of the State's interests.

> The presence of a prosecutor will eliminate the conflict of roles for the judge, the probation officer, the police officer, and the youth's attorney. His presence will undoubtedly help to impress upon the youth the seriousness of the proceedings, should expedite the proceedings

through careful investigation and marshalling of evidence, and will also enhance the accuracy and documentation of social and probation reports through timely and effective challenge, when deemed necessary by the prosecutor. Furthermore, the presence of a skilled professional prosecutor will compel defense attorneys to upgrade the representation of their clients.

Footnotes:

[1]387 U. S. 1 (1967).

[2]See, e.g., Alabama (Code Ala. (1940) (Recompiled, 1958), § 359); Wisconsin (Wis. Stat. Ann. (1957), 48.04); Minnesota (Minn. Stat. Ann. 260.155, but see Minn. Juv. Ct. Rules, Rule 5.2); Virginia (Code Va. (1950) (Repl. Vol. 1960), 16.1-155).

[3]See, e.g., Ohio Rev. Code Ann. § 2151.40 (Baldwin 1973); California (Cal. Welf. & Inst. Code, § 681 (West 1972)).

[4]Prosecution in the Juvenile Courts: Guidelines for the Future, Center for Criminal Justice, Boston U. School of Law (1973), Appendix B.

[5]President's Commission on Law Enforcement and Administration of Justice, Task Force Report; Juvenile Delinquency and Youth Crime (1967), p. 34.

[6]387 U. S. 1 (1967).

[7]44 Misc. 2d 900, 255 N.Y.S. 2d 987 (Family Ct., 1965).

[8]Prosecution in the Juvenile Courts: Guidelines for the Future, Center for Criminal Justice, Boston U. School of Law (1973), p. XVI

[9]Clayton, Emerging Patterns in the Administration of Juvenile Justice, 49 J. Urban L. 377, 393 (1971); Manak, The Right to Jury Trial in Juvenile Court: A Proposal for the Court, the Juvenile and Society, 4 The Prosecutor 325 (1968).

[10]Skoler, Counsel in the Juvenile Court Proceedings, 8 J.Fam. L., 243, 272-73 (1968).

[11]Prosecution in the Juvenile Courts: Guidelines for the Future, Center for Criminal Justice, Boston U. School of Law (1973), p. 171.

[12]Nat'l. Ass'n. of Atty. Gen. Recommendations on the Prosecution Function, #13 (1971).

1. Issue Title: Plea Negotiations--Should the juvenile prosecutor engage in plea discussions in juvenile court; and, if so, to what extent?

2. Description of the Issue:

This issue can not be addressed without first considering the question of the propriety of plea discussions in general. Then, the special circumstances of the juvenile context must be taken into consideration.

3. Summary of Major Positions:

If the juvenile prosecutor adopts a position of no plea discussions in juvenile court, it can be reasonably expected that the number of adjudicatory hearings will increase and will be unduly protracted. However, assuming that the juvenile prosecutor does engage in plea discussions, should he parallel the procedure that exists in adult criminal court? If he follows such procedure to the extent of promising to make a specific disposition at a point in time before a complete social report is available on the juvenile, might he not be, in effect, undermining one of the unique aspects of the juvenile court, i.e., to tailor the disposition specifically to the needs of the juvenile?

4. Summary of State Practices:

No hard data are available on state practices in this area. Plea discussion practices are a function of the prosecutor's discretion and, by and large, are not the subject of statutes or court rules.

5. Summary of Positions Recommended by Standards Groups:

The only standard group that has taken a position specifically on the issue of plea discussions in the context of the juvenile court is the IJA/ABA (1975) Juvenile Justice Standards Project. Its recommendations are as follows:

1. Plea discussions concerning the charges that may be filed may properly be engaged in by the juvenile prosecutor. However, the juvenile prosecutor should not engage in plea discussions concerning the disposition which he may subsequently recommend at a disposition hearing.

2. Plea discussions should be undertaken with both the interests of the state and those of the youth in mind, although the primary concern of the juvenile prosecutor should be the protection of the public interest.

3. The juvenile prosecutor should neither initiate nor continue plea discussions if he is aware that the youth maintains his innocence.

4. An admission or "guilty plea" by a youth should not be agreed to by the juvenile prosecutor without the presentation on the record of independent evidence that the youth has committed the acts alleged.

5. If the juvenile prosecutor finds that he is unable to fulfill the agreement previously reached in plea discussions, he should promptly give notice to the youth and cooperate in securing leave of the court for the youth to withdraw an admission, and take other steps appropriate to restore the youth to the position he was in before the plea was entered.

6. Analysis of the Issue:

One of the most vexatious problems in the adult criminal justice system today concerns the propriety of plea discussions. Opponents of the process criticize it because (1) it gives the prosecuting attorney an incentive to "overcharge," (2) it allows jurisdictions an opportunity to disguise the fact that its judicial and correctional systems are inadequately staffed and financed, (3) it results in the reduced rationality of the processing of criminal defendants, and (4) it discourages defendants from exercising their constitutional rights. For these reasons, the National Advisory Commission has advocated that the practice of plea discussions in the criminal courts be abolished as soon as possible, but in no event later than 1978.[1]

On the other hand, defenders of the process of plea discussion assert that positive effects flow from the employment of this process. Some of these effects are said to be: (1) the defendant receives the benefit of the prompt and certain application of correctional measures; (2) psychologically, the rehabilitative process begins more quickly once the defendant admits his guilt; (3) alternative correctional measures better suited to achieving rehabilitation may be available to the defendant if he admits to the commission of a lesser offense; and (4) the trial process is limited to deciding real disputes. For these reasons, the ABA Standards have sanctioned the process of plea discussion.[2]

Thus, both critics and defenders of the concept of plea discussion

have strong arguments in support of their respective positions. Recognizing this fact, the Task Force may wish to permit plea discussions in the context of the juvenile court, but restrict the number of factors that may legitimately be considered in the process of plea discussion in order to ameliorate the harshest effects of the plea discussion process. It may opt for a Standard to the effect that the juvenile prosecutor may properly engage in plea discussions concerning the charges which he may file against a youth, but that he should not use his power to recommend a harsh disposition in the process of plea discussion with the youth and his counsel. This position is justified on the basis of the differences in structure and goals of the juvenile court from those of the criminal court.

The position that plea discussions relating to charge are permissible is premised on an analysis of the advantages and disadvantages that may flow from the process to the parties concerned. Because the juvenile prosecutor may be considered under a duty not to lose sight of the philosophy and purpose of the juvenile court, while fully and faithfully representing the interests of the State, it is to be anticipated that he will resist the temptation to engage in the practice of "overcharging" (e.g., charging a youth with an offense not customarily charged in the jurisdiction for the conduct in which the youth has allegedly engaged, or charging the youth with an offense for which the State has insufficient evidence.) In addition, the adjudicatory hearing is limited to deciding real disputes among the parties in interest, and the rehabilitative process will begin more quickly once the youth admits his culpability.

On the other hand, the position that the juvenile prosecutor should not use his ability to recommend a harsh disposition at the disposition hearing in the process of conducting plea discussions with the youth and his counsel is based upon two important considerations. The purpose of allowing the juvenile prosecutor to participate in the disposition hearing -- to assure that a disposition designed to meet the youth's need for treatment will not at the same time endanger the interest of the community in its safety and welfare -- would be frustrated if the posture of the juvenile prosecutor is significantly predetermined prior to that hearing as the result of plea discussions. This would result in a reduced rationality in the processing of youthful offenders. Second, the ability of the juvenile prosecutor to participate in the disposition hearing is probably the most powerful inducement which he can use in the process of plea discussion. Because it is his most powerful inducement, it is the inducement most subject to abuse. The assertion by the juvenile prosecutor that he will seek the most restrictive disposition unless the youth agrees to admit the allegations of a petition can most powerfully dissuade the youth from the vigorous assertion of his constitutional rights. In order to control the potential for abuse of this inducement, the Task Force may wish to

consider prohibiting disposition bargaining by the juvenile prosecutor.

Many states provide for different dispositions according to whether a youth is adjudicated delinquent or a person in need of supervision (or other status not involving a violation of the law). The juvenile prosecutor may discuss with the youth or his attorney a modification of the petition from delinquency to person in need of supervision, etc., in exchange for an admission to the allegations of the amended petition. The number of petitions lodged against the youth may be reduced. The juvenile prosecutor may decline to seek transfer of the case to the criminal court in return for an admission to a delinquency petition. However, neither the interests of the State nor those of the youth should be sacrificed. The juvenile prosecutor should be encouraged to weigh the same elements as does the prosecuting attorney in an adult criminal case, with the additional aspect of the youth's unique needs.

Since the accumulation of a record of adjudications is not a proper goal, in itself, for the juvenile prosecutor, neither should be a record of accumulating a large number of dispositions by guilty plea. A majority of youths confess to the allegations of petitions against them, yet many of them probably do so because they are threatened -- to them the juvenile system must seem formidable -- or they think that they will get off with a lighter disposition. It is obviously the duty of the youth's attorney to see that this is not the case, that the plea of his client is voluntary in fact. As part of his duty to seek justice, however, the juvenile prosecutor should also insure that the youth's rights are not violated. If the youth maintains his innocence, it is obvious that his plea cannot be voluntary in fact. In such situations, the juvenile prosecutor should perhaps be required to immediately withdraw from plea discussions. Not to do so may ultimately result in the perpetration of a fraud upon the juvenile court. A Standard embodying this concept would recognize the unique vulnerability of young people to the pressures that can be placed upon them by parents, friends, relatives, and even their own attorney. It would require the juvenile prosecutor to share the responsibility of the youth's attorney in protecting the youth's privilege against self-incrimination. It would decline to apply, in the juvenile court context, the rule of North Carolina v. Alford[3], that a plea of guilty is acceptable, though joined with protestations of innocence, where the defendant persists in the plea and an independent factual basis therefore appears in the record.

Perhaps the juvenile prosecutor's responsiblity in the area of plea discussions is not fulfilled merely by ascertaining that the youth's plea is voluntary in fact. Because of the youth's special vulnerability, the responsibility of the juvenile prosecutor may exceed that of the criminal prosecutor in the plea discussion context. Thus, the Task Force may wish to consider whether a youth can be found delinquent or in need of supervision, or of similar status, based solely on his own admission. Should there be other, independent evidence

to establish guilt? A Standard could require the juvenile prosecutor to present such evidence on the record of the juvenile court.

Item 5 of the IJA/ABA recommendations was adapted from the ABA Standards.[4] It was anticipated that in the great majority of cases, the juvenile prosecutor would be able to fulfill his end of the agreement reached with the youth and his attorney regarding the nature of the petition(s) to be filed in the juvenile court. Occasionally, however, this may subsequently become impossible. A new complaint may be filed against the youth, which might indicate that the agreement reached is no longer in the State's interest or in the interests of the youth. Or, new evidence may have been discovered by the juvenile prosecutor which indicates that the nature of the petition(s) filed has become inappropriate. Also, the juvenile prosecutor may become aware of facts indicating that a guilty plea made or about to be made was or would be involuntary in nature, or that the independent evidence underlying the guilty plea is no longer accurate or persuasive. The Task Force may wish to provide that when situations such as these arise and the juvenile prosecutor finds that he is no longer able to fulfill his agreement, he should promptly notify the youth and his attorney and render his assistance to them to return the youth to the position he would have been in had the agreement not been reached.

7. Task Force Standards and Rationale:

After a long and careful examination of negative consequences, as well as the alleged benefits, of plea bargaining in the juvenile system, the Task Force called for an outright prohibition of plea negotiations in Standard 13.1.

> Plea bargaining in all forms should be eliminated from the delinquency process. Under no circumstances should the parties engage in discussions for the purpose of agreeing to exchange concessions by the prosecutor for the juvenile's admission to the petition.

Similarly, Standard 15.18 from the Chapter on Family Court Prosecution Services specifies that,

> The family court prosecutor should not engage in plea negotiations nor enter into a plea agreement with any person, whether a party, witness, any one in a representative capacity, or others, at any stage of juvenile proceedings subsequent to the initial contact of a complainant with the intake office of the appropriate state agency. Proscribed plea negotiations and plea agreements are those actions of a family court prosecutor leading to

1. reduction in seriousness of a charge originally filed; or
2. dismissal of individual counts or number of charges; or
3. recommendations or action or inaction with regard to the ultimate disposition of a case.

The Commentary to Standard 13.1 sets forth a very detailed and quite lengthy defense of the Task Force's position, emphasizing, among other things, the inherently coercive aspect of plea negotiations and the fact that they lead to decisions that are not rationally related to the merits and circumstances of the individual case.

The Commentary to that Standard repeatedly stresses the fact that,

> The Task Force believes that immediate prohibition, rather than regulation or gradual elimination of plea bargaining is both sound and practical; indeed, it is the only effective way to eliminate the evils of the practice.

However, the Task Force recognized that notwithstanding its strongly worded recommendation,

> there are areas in which plea bargaining is now practiced and will continue to be practiced in the juvenile justice system.

Therefore, the Commentary outlines a number of regulations designed to help reduce the abuses of this practice in these jurisdictions. These regulations require, among other things, that negotiations be conducted by the prosecutor; that he make an independent effort to learn of the juvenile's and his family's background; that he not negotiate when the juvenile maintains his innocence (even if the juvenile persists in the plea, cf. Alford); that he not negotiate as to dispositions; that he present for the record independent evidence that the juvenile committed the acts alleged.

Footnotes:

[1]The National Advisory Commission on Criminal Justice Standards and Goals, Report on Courts § 3.1.

[2]ABA Standards for Criminal Justice, Pleas of Guilty (Approved Draft, 1968), Introduction and § 3.1.

[3]400 U. S. 25 (1970).

[4]ABA Standards for Criminal Justice, The Prosecution Function, § 4.3 (c) (Approved Draft, 1971).

1. Issue Title: Filing Petitions--Should the juvenile prosecutor have the final responsibility concerning the filing of a petition in the juvenile court alleging delinquency?

2. Description of the Issue:

The issue is basically one of responsibility for making the final decision whether a petition shall be filed seeking a delinquency adjudication or whether the juvenile shall be diverted from the formal adjudicatory process. Related issues include the ultimate responsibility for simply taking no action on a complaint and the question of who may withdraw a petition once it has been filed. Choices for the Task Force include vesting responsibility in an intake function not related to the juvenile prosecutor (such as the probation department, various social service agencies, an intake arm of the juvenile court, etc.) or vesting it in the prosecutor. If the latter choice is made, the procedural aspects of the process (interviewing, statements, preparation of petition, etc.) could be carried out by an intake agency independent of the juvenile prosecutor while the prosecutor retains the ultimate responsibility for filing, amending, withdrawal, etc.

3. Summary of Major Positions:

For those who argue that the juvenile prosecutor is not an advocate[1] but rather one of several guardians of the rehabilitative goal of the proceeding (assuming that as a primary goal), there would be little need to give him responsibility for making the ultimate intake decision. Indeed, such could be counter-productive to such a goal. One commentator suggests that the juvenile prosecutor should merely "assist the court to obtain a disposition of the case which is in the best interest of the child."[2] It would be consistent with such an "assistance" role to confine the juvenile prosecutor to simply advising the appropriate intake agency on the technical sufficiency of petitions, questions of admissibility of evidence, matters of proof, etc.

On the other hand, those who view the juvenile prosecutor as an advocate operating in an adversary system, and as having the interests of the State as his prime goal, would wish to give him substantial responsibility at the intake stage because of its critical importance. Issues of public safety, deterrence, and the ultimate goals and objectives of the juvenile court as an institution may be intimately bound up with the question of whether petitions are filed in individual cases or classes of cases.

4. Summary of State Practices:

A 1972 survey of 68 major American cities conducted by the Center for Criminal Justice, Boston University School of Law, found that in only 11.8% of the cities surveyed did the juvenile prosecutor have authority to file a petition; in 22.1% he prepared the petition; in 36.8% he reviewed the petition for legal sufficiency; and in 8.8% he was required to sign the petition.

In 23.5% of the cities, the probation officer had authority to file a petition; in 33.8% he prepared the petition (a clerk prepared the petition in 27.9% of the cases); in 11.8% the probation officer reviewed the petition for legal sufficiency (in 10.3% of the cities a clerk performed this function; in 16.2% it was done by a judge and in a full 10% of the cities no one did it); and in 26.5% of the cities the probation officer was required to sign the petition.[3]

5. Summary of Positions Recommended by Standards Groups:

Owing to the negative view towards a traditional and adversary position for the prosecutor espoused by the President's Task Force Report of 1967[4] and the NCCD Model Rules[5] it is unlikely that either body would endorse a proposal to vest the prosecutor with the responsibility for making the ultimate intake decision.

The IJA/ABA (1975) Juvenile Justice Standards Project recommends the following, inter alia:

1. The juvenile prosecutor must be available to advise the intake officer of the appropriate state agency concerning whether or not the facts alleged by a complaint are legally sufficient to file a petition of delinquency.

2. The juvenile prosecutor should, in all cases in which the act or acts alleged in a petition would constitute a crime if committed by an adult, have the right to file a petition if he believes that the state's interests would be advanced by such action.

3. In all other cases, if the intake officer has decided that the state's interests would be best served by providing the youth care or treatment voluntarily accepted by him, and his parents or legal guardian, the juvenile prosecutor should accept this decision unless the complainant has seasonably appealed the decision of the intake officer to him. Upon receipt of such seasonable appeal, the juvenile prosecutor should consider the facts presented by the complainant, consult with the intake officer who made the initial decision, and make the final decision as to whether a petition

shall or shall not be filed.

Additionally, it is recommended by the IJA/ABA group that the juvenile prosecutor should insure that no petition is filed unless legally sufficient and that he should withdraw such petition if it later develops that it is not.

The IJA/ABA recommendations track closely the procedure utilized in the State of Florida.[6]

6. Analysis of the Issue:

The Task Force may wish to consider an intake procedure similar to that utilized in the State of Florida and recommended by the IJA/ABA project. It constitutes a middle ground between the roles of final decision making authority lodged in an intake agency or lodged with the juvenile prosecutor. Under it there are two levels of intake. The initial decision is made by an intake officer, while the final decision is made by the juvenile prosecutor if an adjudication of delinquency is sought. If an adjudication of dependency or need of supervision is sought, however, any interested person may file such petition with the juvenile court.[7] The basic provisions of the Florida procedure will be analyzed here.

Initial intake is performed by an intake officer of an appropriate state agency. This officer makes a preliminary determination as to whether or not the facts alleged by a complainant are legally sufficient to warrant the filing of a petition. The role of the juvenile prosecutor at this stage of intake is limited to advising the intake officer as to the legal sufficiency of the facts alleged to sustain a petition, but only when requested to do so by the intake officer. The term "legal sufficiency" involves a two-pronged test: (1) whether the facts as alleged are sufficient to establish the court's jurisdiction over the youth, and (2) whether the competent and credible evidence available is sufficient to support the charges against the youth. The first part of the test is concerned with such matters as the age of the juvenile, and the nature of the conduct which he is alleged to have committed. The second part of the test is essentially equivalent to a determination of probable cause. Both prongs of the test must be met before a petition can be filed.

If the intake officer decides that the facts are legally sufficient to file a delinquency petition, he may request that the juvenile prosecutor file the petition. If the intake officer decides that the facts are legally sufficient to file a dependency or need of supervision petition, he may himself file the petition.

In the case of any petition, if the intake officer finds that the facts alleged are legally sufficient to file a petition, but

determines that the interests of the juvenile and of the State will be best served by providing the youth with care or other treatment voluntarily accepted by the youth, and his parents or legal guardian, he may refer the youth for such care or treatment.

If the intake officer refuses to request that a delinquency petition be filed, he must then notify the complainant of his refusal and of the reasons therefor, and must advise him that he has a right to obtain a review of this decision by the juvenile prosecutor. Upon receiving a request for review, the juvenile prosecutor must consider the facts presented by the complainant, consult with the intake officer who made the initial decision, and then make the final decision as to whether or not a delinquency petition shall be filed.

If the intake officer refuses to file a neglect or need of supervision petition, he must advise the complainant that he himself has a right to file the petition.

In all cases in which the act or acts charged would constitute a crime if committed by an adult, the intake officer must give a written notice of the circumstances to the juvenile prosecutor, together with a recommendation concerning the filing of a petition. The juvenile prosecutor then has the right to file a delinquency petition, regardless of the decision or indecision of the intake officer. No appeal is provided for from the decision of the juvenile prosecutor.

Under the Florida procedure, the intake officer makes an initial investigation to determine whether or not a child is a proper subject for juvenile court jurisdiction. This investigation, however, does not preclude the juvenile prosecutor from making his own independent investigation in this area. Although the intake officer makes a recommendation to the juvenile prosecutor to file or not to file a delinquency petition, the juvenile prosecutor has the final decision concerning whether or not to file such a petition.[8] Therefore, under such a procedure a juvenile prosecutor should have authority to make his own independent examination of the facts. In addition, since in the more serious cases, it would be the responsibility of the juvenile prosecutor to decide whether or not to seek a transfer of a case to the criminal court, he should have the ability to investigate the desirability of such a course of action.

If a juvenile prosecutor is to be given substantial intake responsibilities, and the right to make an independent examination of the facts, he should probably also be permitted to inquire into the juvenile's personal circumstances. Such an inquiry could encompass at least three facets: (1) his health, both mental and physical, (2) his home situation, and (3) his past record with the juvenile court and the police.

The inquiry into the juvenile's mental health would be relevant if he were undergoing treatment substantially similar to that which the juvenile court might order if he were to be adjudicated delinquent. In such a situation, as long as the safety and welfare of the community is not threatened, neither the interest of the State nor that of the juvenile would be advanced by the filing of a petition. Similar analysis would be appropriate if the juvenile, subsequent to the time of the behavior of which complaint has been made, is suffering from a physical illness or injury. Thus, if, for example, a juvenile is hospitalized, and the conduct of which he is accused is not serious, the juvenile prosecutor may exercise his discretion to properly decline to file a petition.

Inquiry into the juvenile's home situation may be relevant depending upon the conduct of which complaint has been made. If, for example, the alleged conduct consists of an offense against a parent or guardian, and that parent or guardian is himself the subject of a neglect or child abuse proceeding in the juvenile court, it might be proper for the juvenile prosecutor to decline to file a petition until the merits of the other proceeding are determined. If the result of the other proceeding is a loss of custody by the parent or guardian, or some other disposition which renders a repetition of the conduct alleged to have been committed by the juvenile unlikely, neither the interests of the State nor those of the juvenile would be advanced by the filing of a petition.

Finally, an inquiry into the juvenile's past record with the juvenile court and the police is relevant in every situation in which a complaint is made. Thus, if a merchant complains that a juvenile has stolen an item of relatively minor value, and the juvenile has no prior record, either with the court or the police, an informal disposition would be in order. On the other hand, if the juvenile has had a prior complaint filed against him for a similar offense, and an informal disposition of the complaint was made at that time, the juvenile prosecutor may decide that a formal adjudication of the present complaint is necessary, if only to impress upon the youth the seriousness of his present course of conduct. It would be anticipated that in the overwhelming majority of cases, the juvenile prosecutor would follow the recommendation of the intake officer concerning whether or not a delinquency petition should be filed.

Once the juvenile prosecutor is satisfied that legal sufficiency can be established, three possible courses of action could be available to him: (1) a pre-adjudication disposition; (2) a formal adjudication in the juvenile court; and (3) transfer of the case to the criminal court.

Where the investigation indicates that the nature of the conduct alleged and the youth's particular circumstances warrant it, the

juvenile prosecutor could transfer the case to the probation department for an informal disposition, if the public interest is not compromised. The use of this alternative should probably be strongly encouraged by any Standards adopted by the Task Force, as it avoids the stigma of official action by the juvenile court, where such action is not necessary to futher the goals of rehabilitation and the public interest.

On the other hand, if the juvenile prosecutor believes that the public interest would be sacrificed by an informal disposition at the intake stage, and legal sufficiency exists, he should promptly file a petition with the juvenile court to initiate the formal adjudicative process. This action would still leave open the option of subsequently entering into plea discussions with the juvenile's attorney which may result in dismissal of all or part of the petition.

7. Task Force Standards and Rationale:

The Task Force did, indeed, opt for a filing procedure similar to that utilized in Florida and recommended in the IJA/ABA draft.

Standard 15.13 specifies that,

> the family court prosecutor should be available to advise the intake officer of the appropriate state agency whether the facts alleged by a complainant are legally sufficient to file a petition of delinquency.
>
> All petitions should be prepared, signed, and filed by the family court prosecutor. Filing should be done as expeditiously as possible. Where the juvenile is in custody, the petition should be filed within 48 hours of the initiation of custody or the next family court day, whichever occurs first.
>
> Upon receiving a complainant's request for review, the family court prosecutor should consider the facts presented by the complainant, consult with the intake officer who made the initial decision, and then make the final determination as to whether a petition should be filed.

The Commentary to the Standard indicates,

> The review of an intake officer's decision with respect to filing at the request of the complainant provides a useful check on the intake officer's discretion. At the same time, this approach prevents the complainant's filing of a groundless or ill-advised petition, one that

the family court prosecutor later might determine cannot be legally sustained.

The Task Force viewed making the family court prosecutor's decision final and not reviewable as consistent with the prosecutor's traditional charging descretion and his quasi-judicial role.

Footnotes:

[1]See, e.g., Fox, Prosecutors in the Juvenile Court: A Statutory Prosecutor, 8 Harv. J. Leg. 33 (1970); NCCD, Model Rules for Juvenile Courts, Comment to Rule 24 (1969); President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Juvenile Delinquency and Youth Crime (1967) at 34.

[2]Whitlatch, The Gault Decision: Its Effect on the Office of the Prosecuting Attorney, 41 Ohio Bar J. 41 (1968).

[3]Prosecution in the Juvenile Courts: Guidelines for the Future, Center for Criminal Justice, Boston U. School of Law (1973), Appendix B., pp. 301-304.

[4]President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Juvenile Delinquency and Youth Crime (1967) at 34.

[5]NCCD, Model Rules for Juvenile Courts, Comment to Rule 24 (1969).

[6]Fla. Stat. Ann., Section 39.04 (Spec. Supp. 1973).

[7]Fla. Stat. Ann., Section 39.05 (Spec. Supp. 1973).

[8]Fla. Stat. Ann., Section 39.04 (a) (Spec. Supp. 1973).

1. Issue Title: Adversary Role--Should the juvenile prosecutor assume the traditional adversary role of a prosecutor at the adjudicatory phase and all other proceedings of the juvenile court?

2. Description of Issue:

Resolution of the issue may turn upon the nature of the adjudicatory hearing and other stages of juvenile court proceedings, especially delinquency proceedings. If they are essentially adversary in format, the role of the prosecutor will be clearly defined. Even if their nature lies somewhere between a formal, adversary type of hearing and an informal hearing centered wholly upon the needs of the child, the prosecutor may still assume an essentially adversary role if he perceives his paramount interest to be protecting the community from what he considers to be dangerous conduct and propensities of a juvenile.

3. Summary of Major Positions:

The juvenile court acts of several states specifically declare that under no circumstances should the adjudicatory hearing be adversary in nature.[1] With the advent of counsel for the youth, however, it can be argued that counsel for the State has become a necessity. For counsel to be effective and useful, and to effectively represent his client, an adversary hearing is all but inevitable. An adversary hearing may also be necessary to insure due process and fair treatment, not only in actuality, but in appearance, for the youth, his parents, the complainant, and the public. It may help to impress upon the youth and others the seriousness of the proceedings, and gain respect and understanding within the community for the juvenile court.

On the other hand, an adversary hearing and an adversary role for the prosecutor may be out of keeping if the major purpose of the proceeding is to determine the child's problem and the best rehabilitative model for treating it. In these circumstances an adversary role for the prosecutor may seriously threaten the child and make him unresponsive to the rehabilitative efforts to be applied by the juvenile court. The President's Task Force Report of 1967, in discouraging even the use of a public prosecutor in juvenile court, expresses the fear of some that an adversary role of the prosecutor may be too great a departure from the "spirit" of the court.[2] Therefore, whatever that "spirit" is determined to be by the present Task Force will shape the proper role for the prosecutor in the proceedings.

4. Summary of State Practices:

Neither statute nor court rules, as such, define the role of the prosecutor; they usually focus upon the nature of the proceeding.[3]

A 1972 survey of 68 major American cities conducted by the Center for Criminal Justice, Boston University School of Law, found that in 38.2% of the cities surveyed, a public prosecutor represented the State at a detention hearing; in 11.8% he was authorized to file a petition; in 22.1% he prepared the petition; in 36.8% he reviewed the petition for legal sufficiency; in 8.8% he signed the petition; in 76.5% he represented the State at pre-trial motions; in 73.5% he represented the State at probable cause hearings; in 45.6% he conducted the pre-hearing negotiations for the State; in 47.1% he could request that a juvenile be bound over; in 76.5% he represented the State at bind-over hearings; in 2.9% he could request a physical or mental examination of the juvenile; in 22.1% he had authority to amend a filed petition; in 44.1% he could move for dismissal of a filed petition; in 72.1% he represented the petitioner at adjudication hearings; in 48.5% he represented the petitioner at disposition; in 67.6% he conducted the examination of witnesses; in 8.8% he recommended a disposition to the judge; in 69.1% he represented the petitioner on appeal; in 72.1% he represented the State in habeas corpus proceedings; and in 30.9% he presented the case on an alleged probation violation.[4] Where these functions were not performed by the prosecutor they were performed at various times by clerks, non-attorney prosecutors, probation officers, or judges.

It should be noted that no matter how the procedure is defined (adversary, non-adversary, or some middle ground), and even if there is a long tradition of the presence of a prosecutor in the proceedings, his role will be largely defined by subjective factors, i.e., how the prosecutor, and to a great extent the judge, view the proper role to be assumed in the context of a particular proceeding.

5. Summary of Positions Recommended by Standards Groups:

As noted, supra, the President's Task Force Report of 1967 discourages the use of a public prosecutor in juvenile court, basically because of a concern that an adversary role by someone representing the State may be too great a departure from the "spirit" of the court as it then existed.[5] The NCCD Model Rules for Juvenile Court also recommend against an adversary role for the juvenile prosecutor.[6]

On the other hand, the IJA/ABA (1975) Juvenile Justice Standards Project recommends that the juvenile prosecutor should assume the traditional adversary position of a prosecutor, presenting evidence on the petition in the interests of the State. The primary duty of

the juvenile prosecutor is defined, like that traditionally assumed by the adult prosecutor, as seeking justice. He is admonished to fully and faithfully represent the interests of the State, but at the same time he is also encouraged not to lose sight of the philosophy and purpose of the juvenile court. This role is to be assumed in all juvenile court and related proceedings, from detention and probable cause hearings to post-disposition proceedings. The IJA/ABA Standards also opt for an adversary proceeding and for a dispositional structure centering upon determinate sentences.

6. Analysis of the Issue:

Should the juvenile prosecutor assume the full role of an advocate, taking the interests of the State as paramount, while insuring the best interests of the youth? At first glance, it may appear that these two principles are contradictory, but this is not always the case. The interests of the State vary in form and intensity throughout the various stages of proceedings in the juvenile court, so that the vigor with which the juvenile prosecutor asserts his adversarial posture will also vary.

Thus, at the intake stage, the role of the juvenile prosecutor may be initially limited to advising the intake officer of the legal sufficiency of a complaint, although perhaps he should make the final decision whether or not a petition seeking an adjudication of delinquency is filed. In making the latter decision, the juvenile prosecutor could develop a consistent policy so that youths in similar relevant circumstances receive similar consideration.

The juvenile prosecutor may engage in plea discussions with the youth and his counsel, but to minimize the possible abuse of his discretion, the subjects which he is permitted to discuss may be circumscribed. Thus, he may be allowed to discuss with the youth the charges which may be filed against him. The youth may agree to admit the allegations which are contained in a petition in return for which the juvenile prosecutor may decline to seek a formal adjudication of other petitions which could be filed, or may file a petition, the legal consequences of which are less severe. On the other hand, the juvenile prosecutor should probably not utilize what may be his most powerful tool to induce a youth to admit the allegations of a petition - his ability to recommend a more restrictive disposition than the circumstances warrant. As his most powerful inducement, it is the one most subject to abuse. This framework could enable the juvenile prosecutor to effectively represent the State's interests during plea discussions. The best interests of the youth, however, could also be provided for if the one inducement which is most likely to coerce him to admit to having committed acts which he did not in fact commit can not be utilized

by the juvenile prosecutor. Further protection could be accorded the youth in requiring the juvenile prosecutor to place on the record in the juvenile court independent evidence tending to prove that the youth has committed the acts to which he admits. Because the State's interests do not encompass forcing a youth to admit to the commission of conduct which he did not in fact commit, the juvenile prosecutor could be required to withdraw from plea discussions when the youth maintains his innocence.

It is at the adjudicatory stage of family court proceedings that the adversity of interests between the youth and the State is greatest. Thus, at this stage, the juvenile prosecutor could assume his traditional adversary role as a prosecutor, assuming that the Task Force adopts an adversary model for the proceedings. The juvenile prosecutor could present the evidence for the State in support of the petition, and could vigorously cross-examine all witnesses which the youth may present to the court. This stage of juvenile court proceedings may be most akin to a criminal trial, and therefore, the ABA Standards for Criminal Justice, The Prosecution Function could be considered and relied upon for further defining the role of the juvenile prosecutor as well as for his relationships with others within the juvenile justice system.

The adversity of interests in the dispositional phase need not be as sharp as that in the adjudicatory phase. Here, the juvenile prosecutor may be allowed to participate in the disposition hearing to assure that the interests of the State are fully represented. However, considerable flexibility may be advisable in his posture. A range of dispositional alternatives may adequately protect the interest of the community in the safety and welfare of its citizens, but some of these alternatives may be better suited to a youth's needs than others. In this situation, the juvenile prosecutor should perhaps take into account the best interests of the youth in making a disposition recommendation, so long as the community's interest in its safety and welfare is not endangered. He should not feel that he is under any compulsion to recommend a harsh disposition just because his position is that of a prosecutor.

Further opportunities for a reconciliation of what may appear to be, but may not in fact be, conflicting interests of the youth and the State, occur in the area of subsequent litigation. Thus, if a youth petitions the juvenile court for a modification of the disposition to which he is presently subject, the juvenile prosecutor should not automatically oppose the petition. He should carefully study the matter, and if he decides that the State's interests will not be compromised, and that the modification sought will better suit the youth's needs, the juvenile prosecutor may even join the youth in seeking the modification, or decline to oppose it. If, however,

he believes that the interests of the State would be compromised by the proposed modification, he should oppose it. When the latter situation occurs, it will be the duty of the juvenile court to resolve the conflict in an adversary hearing.

It would be less than honest to maintain that there is no philosophical conflict between the idea that the juvenile prosecutor should vigorously represent the State's interests and the idea that his duties are best performed with the judicious utilization of discretion on his part in order to attempt to also provide for the best interests of the youth. The prosecutor in the criminal justice system must also cope with a similar conflict, as while he is an advocate operating within an adversary system, he is also obliged to protect the innocent as well as to convict the guilty.[7] In order to effectuate a working reconciliation between these two obligations the prosecutor in the criminal justice system exercises a substantial amount of discretion.[8] It may thus be out of necessity, in addition to conscious choice, that the Task Force may wish to leave undisturbed the exercise of substantial discretion in the discharge of the juvenile prosecutor's duties.

The paramount goal of any Standards adopted to resolve these issues should be to provide the juvenile prosecutor with a more definite sense of identity and purpose. They probably should not purport to be an authoritative guideline of how this role is best or most properly carried out. Further structuring of the role of the juvenile prosecutor can probably be accomplished only after years of actual experience, keeping in mind that the phenomenon of an attorney representing the interests of the State in juvenile court is still relatively recent.

7. Task Force Standards and Rationale:

The Task Force addressed the issue of the appropriate role of the family court prosecution in Standard 15.8.

> The primary duty of the family court prosecution is to seek justice: To fully and faithfully represent the interests of the State, without losing sight of the philosophy and purpose of the family court. The family court prosecutor shall function as an adversary, but shall avoid the role of a criminal prosecutor.

In general, the Commentary to this Standard closely follows the arguments and analysis set forth above. The Task Force recognized the genuinely adversary nature of some stages of family court proceedings, but it opposed the wholesale grafting of the criminal prosecutor's traditional role into family court matters.

Footnotes:

[1]See e.g., Arkansas (Ark. Stat. 1947, § 45-215 (Repl. Vol. 1964)): the proceeding " . . . shall at no time assume the form of an adversary suit, or a legal combat between lawyers. . ."; Illinois (Ill. Rev. Stat. 1973, ch. 37, § 701-20 (1)): the proceeding is ". . . not intended to be adversary in character. . ."

[2]President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Juvenile Delinquency and Youth Crime (1967), p. 34.

[3]Supra, note 1.

[4]Prosecution in the Juvenile Courts: Guidelines for the Future, Center for Criminal Justice, Boston U. School of Law (1973), Appendix B.

[5]Supra, note 2.

[6]NCCD Model Rules for Juvenile Courts, Comment to Rule 24 (1969).

[7]ABA Code of Professional Responsibility, EC 7-13.

[8]La Fave, The Prosecutor's Discretion in the United States, 18 Am. J. Comp. L. 532 (1970).

1. Issue Title: Dispositional Recommendations and Monitoring--Should the juvenile prosecutor be permitted to take an active role in the dispositional stage of juvenile court proceedings, including making his own disposition recommendations? Should he also monitor the effectiveness of juvenile court dispositions within his jurisdiction?

2. Description of the Issue:

Many states make no provision for permitting a dispositional recommendation by the prosecutor in juvenile court proceedings, although this is the stage in which the interests of the State may be most urgent. Should the juvenile prosecutor be permitted to make his own, independent dispositional recommendation in order to insure that the public interest has been taken into account by the juvenile court? In addition, should he periodically assess the success of particular modes of dispositions used within his jurisdiction, so that he may be in the best possible position to make his on-going dispositional recommendations? The issue of an active role for the juvenile prosecutor in the dispositional phase is especially important, since, it can be argued, if he is to represent the best interests of the State and his community, he must be able to significantly influence the final outcome of the proceedings.

3. Summary of Major Positions:

Those who view the role of the prosecutor as less than an advocate[1] see no need to give the prosecutor a voice at the dispositional phase of the proceedings. For example, one commentator suggests that the prosecutor should merely "assist the court to obtain a disposition of the case which is in the best interest of the child."[2] But those who view him as an advocate essentially in an adversary system, and as having the interests of the State as his prime goal, would wish to give him a clear voice in such a phase in order to make certain that this role is carried out effectively.

4. Summary of State Practices:

A 1972 survey of 68 major American cities conducted by the Center for Criminal Justice, Boston University School of Law, found that in only 8.8% of the cities surveyed did the prosecutor make a recommendation concerning disposition. In 60.3% of the cities a disposition recommendation was made by the probation officer.[3]

5. Summary of Positions Recommended by Standards Groups:

Owing to the negative view towards a traditional and adversary position for the prosecutor espoused by the President's Task Force Report of 1967[4] and the NCCD Model Rules,[5] it is unlikely that either body would endorse the concept of giving the prosecutor an active role at the dispositional phase of juvenile court proceedings.

The IJA/ABA (1975) Juvenile Justice Standards Project permits the juvenile prosecutor to take an active role in the dispositional phase, if he chooses to do so. If he decides to make his own recommendation on disposition, he is admonished to do so only after reviewing any reports prepared by his own staff, the probation department, or others at his disposal. He is also admonished that while the safety and welfare of the community may be his paramount concern, he should consider alternative modes of disposition which more closely satisfy the interests and needs of the youth without jeopardizing that concern. These Standards also state that the juvenile prosecutor should undertake his own periodic evaluation of the success of particular dispositional programs that are used in his jurisdiction, from the standpoint of the interests of both the State and the youth, and that if he discovers that a youth or class of youths are not receiving the care and treatment contemplated by the juvenile court in making its dispositions, he should inform the juvenile court of this fact.

6. Analysis of the Issue:

By giving the juvenile prosecutor the option to participate in the dispositional hearing, he may be better able to assure the community that its safety and welfare are protected, especially in view of the possible confidentiality of the proceedings.

If the juvenile prosecutor is given the option to take an active role in the dispositional hearing, any recommendation that he makes should probably be independant of that of the probation department or counsel for the youth, although they may all reach the same conclusion. While the juvenile prosecutor is the representative of the community, he need not seek the most severe disposition allowable under the facts and the law of the case. He would want to take into account the interests and needs of the youth and his prospects for rehabilitation in different dispositional programs. In doing so, he could consider all social and medical reports concerning the youth prepared by his own investigators, the probation department, and other agencies. He might also consider the youth's police and juvenile court record. In order to effect a greater uniformity in the administration of juvenile justice, the juvenile prosecutor should probably be encouraged to

consider dispositions that have been made in similar cases. While he may decide to recommend the same disposition which the youth's counsel seeks, he should probably do so only if the interest of the community would not be sacrificed and if the youth's short and long term interests would not be damaged.

Implicit in the recommendation of a particular disposition would be the recommendation of a time limit for the disposition, whether it be institutionalization or probation. Presently, in many states, if a youth is placed in an institution or training school, he will likely remain there until he reaches majority. In many instances, the safety and welfare of the community has not required so long a detention, and frequently this has not been in the youth's best interests. Often, there has been a failure of the correctional system and the juvenile court to monitor the youth's progress after he has been institutionalized. By recommending a time of limitation with each dispositional recommendation that he makes, the juvenile prosecutor would at least be able to sound the warning that the youth is not to be forgotten after his day in court.

If the juvenile prosecutor is permitted to make dispositional recommendations, he must be in a position to make intelligent recommendations. In order to be able to do so, he could periodically assess the success of each mode of disposition to which youths in his jurisdiction are subjected. If he finds that a particular mode of disposition fails to meet either the youth's need for care and treatment or the community's interest in its safety and welfare, he could inform the juvenile court and the department or organization in charge, and cease recommending that particular mode of disposition.

Any Standards adopted by the Task Force in this area need not require the juvenile prosecutor to monitor individually each disposition that is made by the juvenile court. His primary duty in this area could be directed toward the efficacy of various modes of disposition employed, rather than toward individual cases. However, either in the course of his periodic evaluation of various modes of disposition, or through the receipt of complaints from a youth or his parents or guardian, the juvenile prosecutor would become aware that in a particular disposition or class of dispositions, a dispositional order is being frustrated by the official action or inaction of correctional agencies. When this occurs, he could inform the juvenile court to that effect so that it -- at least in those states in which the court retains jurisdiction over dispositional matters -- could take appropriate action.

While some may feel that the duties of the juvenile prosecutor should not encompass the monitoring of the effectiveness of various modes of disposition, sound reasons may exist for his involvement in this phase of the juvenile justice system. Since youths have a

right to treatment,[6] someone should be active in assuring that the various modes of disposition employed by the juvenile court are, on the whole, accomplishing what they purport to accomplish. While probation officers or social workers may be monitoring the effectiveness of the various programs, they may not have the authority to compel the attention of the proper officials; also their interests, as a practical matter, do not always coincide with those of the youth. The juvenile prosecutor, by virtue of the power and prestige of his office, should be able to compel such attention. Additionally, by virtue of his activity in this area, the juvenile prosecutor is more likely to command the respect and cooperation of the entire community, and will be better able to fulfill his overall responsibilities. Finally, the rehabilitation of young people is a prime goal of the juvenile justice system. Much of the effort expended by the juvenile prosecutor and other participants in the system is rendered ineffective if dispositional programs are unsuccessful. As the representative of the State's interests, the juvenile prosecutor could help to insure that the rehabilitative treatment that young people receive is effective.

7. Task Force Standards and Rationale:

The Task Force addressed the issue of the family court prosecutor's role in dispositional proceedings in Standard 15.19.

> The family court prosecutor should take an active role in the dispositional hearing. He should make his own, independent recommendation, after reviewing the reports prepared by his own staff, the probation department, and any others. While the safety and welfare of the community is his paramount concern, the family court prosecutor should consider alternative modes of disposition which more closely satisfy the interests and needs of the juvenile without jeopardizing that concern.

The Task Force viewed this approach as consistent with its perceptions of the appropriate role of the family court prosecutor as an advocate in an essentially adversary system, albeit not one which comports with the traditional criminal adversary model.

While the Standard itself is silent on the related issue of monitoring the effectiveness of dispositional programs, the Commentary endorses such monitoring.

Footnotes:

[1]See, e.g., Fox, Prosecutors in the Juvenile Court: A Statutory Prosecutor, 8 Harv. J. Leg. 33 (1970); NCCD, Model Rules for Juvenile Courts, Comment to Rule 24 (1969); President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Juvenile Delinquency and Youth Crime (1967) at 34.

[2]Whitlatch, The Gault Decision: Its Effect on the Office of the Prosecuting Attorney, 41 Ohio Bar J. 41 (1968).

[3]Prosecution in the Juvenile Courts: Guidelines for the Future, Center for Criminal Justice, Boston U. School of Law (1973), Appendix B, p. 317.

[4]President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Juvenile Delinquency and Youth Crime (1967) at 34.

[5]NCCD, Model Rules for Juvenile Courts, Comment to Rule 24 (1969).

[6]Nelson v. Heyne, 491 F. 2d 352, 360 (7th Cir. 1974); Morales v. Turman, 364 F. Supp. 166, 175 (E.D. Tex. 1973); Martarella v. Kelley, 349 F. Supp. 575, 585 (S.D. N.Y. 1972).

MEMORANDUM

ISSUES RELATING TO THE ROLE OF DEFENSE COUNSEL IN JUVENILE COURT PROCEEDINGS

This memorandum is intended to serve two functions: it provides a comparative view of theories of juvenile court representation and identifies several crucial issues concerning definition of counsel's role. You and the Task Force members will, I hope, forgive the generality of the following discussion, remembering with charity the time limitations under which the draft was completed.

I. A COMPARISON OF VIEWS OF COUNSEL'S ROLE IN JUVENILE COURT PROCEEDINGS

A comparative analysis of rules for defense counsel in juvenile cases, such as you are seeking in other areas of juvenile court law, is not possible. There is, as far as I know, no official set of rules of professional conduct specifically addressed to juvenile court representation, much less are there divergent official rules in this area. Moreover, what guidance there is seems to say that the Code of Professional Responsibility governs representation of children in this forum in the same way that it governs the conduct of counsel in civil and criminal matters generally. ABA, Committee on Ethics and Professional Responsibility, Informal Opinion 1160 (1971).

While there is little overt official conflict in the rules for professional behavior in juvenile court, there has long been uncertainty as to what those rules are. Traditionally, juvenile courts considered cases involving children "nonadversarial" with respect to both the relationship between the parties and the forms of procedure employed. Initially, legal representation in such a forum was thought not only unnecessary but undesirable. As one standard treatise put it, the appearance of counsel "usually complicates the proceedings and serves neither the interests of the child nor the interests of justice." H. Lou, Juvenile Courts in the United States 137-38 (1927). It is not surprising, therefore, that lawyers rarely appeared in juvenile cases prior to 1967; typically fewer than ten percent of all parties before these courts received legal assistance. President's Commission on Law Enforcement and Administration of Criminal Justice, Task Force Report: Juvenile Delinquency and Youth Crime 82 (1967). With In re Gault, 387 U. S. 1 (1967), the importance of legal representation, at least for delinquency prosecutions, was firmly established. While the Court held that a child charged with delinquent conduct, as an adult charged with crime, "requires the guiding hand of counsel at every stage in the proceeding against him," it did not entirely clarify the nature of those proceedings nor the role of counsel

participating in them. There has been, in consequence, considerable effort to preserve as far as possible the traditional, non-adversary approach to juvenile matters and to accommodate counsel's role to the requirements of that approach. Two of these methods of accommodation should be particularly mentioned, since they involve a fundamental redefinition of the lawyer's function.

The "Guardianship" Theory of Counsel's Role: It has widely been proposed that a lawyer appearing in juvenile cases should assume functions like those of the guardian ad litem appointed to represent the interests of minors in civil cases where the child's property or other interests are at stake. In the context of juvenile court representation, an attorney as guardian primarily is concerned with ascertaining and presenting to the court on his client's behalf the plea and program best calculated to serve his client's general welfare. Jacob Isaacs perhaps best described this theory in connection with creation of the New York "law guardian" system of appointed counsel for family courts:

> The use of the term "guardian" as part of the title assigned to legal counsel in the Family Court would seem to connote an intention on the part of the Legislature to expand counsel's role beyond advocacy alone. The concept of "guardianship" would seem to require that not only the legal rights but the general welfare of the minor be thrown on the scale in the weighing by counsel of his course of action. The role of the "wise parent" has, in effect, been transferred from the court itself to the law guardian.

Isaacs, "The Role of the Lawyer in Representing Minors in the New Family Court," 12 Buff. L. Rev. 501, 506-07 (1963). For empirical evidence that many lawyers do embrace a guardianship definition of their function, see Dootjes, Erickson & Fox, "Defense Counsel in Juvenile Court: A Variety of Roles," 14 Can. J. Crime & Corr. 132, 143 (1972); Cayton, "Relationship of the Probation Officer and the Defense Attorney after Gault," 18 Fed. Prob. 8, 9 (1970).

The principal difference between the advocacy role usually assumed by counsel in civil and criminal representation and a guardianship function is clearly suggested in Issac's remark that "not only the legal rights but the general welfare of the minor be thrown on the scale in the weighing by counsel of his course of action." As an advocate, the lawyer is expressly required to leave to his client decisions concerning whether a lawful objective should be pursued. The latter must decide, for example, whether to accept a civil settlement, and whether to plead guilty to a criminal

charge. E.g., ABA, Code of Professional Responsibility, DR 7-101 (A), EC 7-1, EC 7-7; ABA, Standards Relating to the Defense Function, § 5.2(a) and Commentary. Attorneys may, of course, urge one course or another, but may not properly arrogate the final decision to themselves.

The "guardian," on the other hand, may frankly assume responsibility for these determinations. Defense counsel might, for instance, insist on entering an admission to charges where he though the respondent would benefit from court action. One New York law guardian, following this view, determines plea in consultation with the respondent's parents and, sometimes, probation personnel; his client's instructions are not solicited or followed because of their presumed incompetence to make wise decisions in this respect and because of the special nature of juvenile court proceedings. Edelstein, "The Duties and Functions of the Law Guardian in the Family Court," 45 N.Y.S.B.J. 183 (1973). A Chicago public defender puts the difference between advocacy and guardianship neatly when he observes, "In criminal court, I do everything to get my client off, but not here... I have to size up pretty quickly what is best for a kid (in juvenile court)." H. Schechter, Defending Kids: The Public Defender and the Social Organization of Juvenile Court 22-23 (Ph.D. thesis, Northwestern University, 1971).

Responsibility for decisions other than plea may also be exercised by counsel acting in a guardianship role. With respect to the privilege against self-incrimination, it has been observed, "A child's attorney may feel that the best interest of his client is served not so much by attempting to spare him from adjudication of delinquency, as by presenting the court with sufficient information to allow the court to exercise its own judgment as to the issue of the child's delinquency. As distinguished from the adult situation, the juvenile attorney may feel permitted -- indeed obligated -- to act on a conviction that non-criminal sanctions and paternal guidance are the best thing for the child he is representing." Kay & Segal, "The Role of the Attorney in Juvenile Court Proceedings: A Non-Polar Approach," 61 Geo. L.J. 1401, 1411 (1973). Isaacs also suggested that "(d)ecisions as to whether or not to invoke the privilege against self-incrimination must be made in a broader and different perspective than that merely employed in adult criminal matters." Isaacs, "The Lawyer in the Juvenile Court," 1 Crime. L.Q. 222, 234 (1968). The lawyer may accordingly waive the child's privilege on grounds of "social desirability," though only with great care. Id. Again, the guardianship approach differs substantially from the role occupied by attorneys in other connections. In criminal cases, the decision whether to testify is allocated to the client, and not his attorney. ABA, Standards Relating to the Defense Function, § 5.2 and Commentary; People v. Brown, 54 Ill. 2d 21, 294 N.E. 2d 285 (1973). The same point may be made with respect to the lawyer-client privilege. In civil and criminal matters alike, confidential communications may be

revealed, except in narrowly defined circumstances, only at the instance of the client. In juvenile representation, however, it has sometimes been suggested that the lawyer may reveal secrets and confidences when they bear on the need for treatment, without respect to the respondent's consent. See NCCD, Procedure and Evidence in Juvenile Court 43 (1962); Steinfeldt, Kerper & Friel, "The Impact of the Gault Decision in Texas," 20 Juv. Ct. Judges J. 154 (1969).

The "Amicus Curiae" Theory of Counsel's Role: Some lawyers have adopted an intermediate position between guardianship and advocacy roles. As amicus curiae, the lawyer largely functions as an intermediary between judge, child, parents, and other court personnel. While an attorney following this theory would protect the child's "rights," he would not raise every objection to the reception of evidence or every defense arguably available under the law. See Kay & Segal, supra; Dootjes, Erickson & Fox, supra at 142-43. A careful study of lawyer's role perceptions in Toronto revealed that the majority of attorneys sampled tended to represent juveniles "less vigorously than adults" and followed essentially an amicus curiae view of their duties in juvenile cases. Dootjes, Erickson & Fox, supra at 137. Indeed, it seems that this approach has found institutional as well as practical expression in the office of "duty counsel," who are attorneys assigned to a courtroom rather than to specific clients. His activities must, therefore, be directed to assisting his client at trial rather than to development and presentation of the client's case from outset to conclusion, which necessarily requires something like an amicus curiae role. A survey of attorneys in California also found that most took a view of their duties which fell in the "ambiguous area between the two extremes of advocacy and rehabilitation (analogous to the 'guardianship' view described above)." Cayton, supra at 10. An amicus curiae role has also been adopted by private practitioners; a study of small-fee attorneys revealed that they conducted a child's defense in juvenile cases "not so much on the objective determination of facts as on his relationship to the court and his client's family." Platt & Friedman, "The Limits of Advocacy: Occupational Hazards in Juvenile Court," 116 U. Pa. L. Rev. 1156, 1184 (1968).

This essentially neutral posture for counsel sharply diverges from the traditional requirement in other areas of representation that a lawyer pursue the lawful objectives chosen by his client "with warm zeal." Advising all court participants on legal points becomes most important, rather than arguing the position that best advances the respondent's claim or defense. And, like the lawyer who views himself as a "guardian," an attorney acting as amicus curiae would not always feel bound to seek the adjudicative or dispositional result desired by his client or to object to probative but arguably inadmissible evidence.

The IJA/ABA Approach: The IJA/ABA Juvenile Justice Standards Project considered and rejected the modified definitions of counsel's role in favor of an advocacy approach in all but a small class of cases. A "guardianship" or amicus curiae function is recognized only when, as sometimes happens in neglect cases and occasionally in delinquency or PINS matters, the client is so young and immature as to have no real understanding of the nature and consequences of the proceedings involving his status or custody. The reasons for adopting this position are set forth in summary fashion in the General Introduction to the Defense Counsel volume, which is attached to this memorandum. The lawyer's role as an advocate is defined in detail throughout the Standards, but specific reference may be made to Part III, dealing with the lawyer-client relationship, and Sections 5.2 and 9.4, for the advocacy principle. This approach has largely been followed by the New York Legal Aid Society in the New York City Family Court. See Paulsen, "The Expanding Horizons of Legal Services, II," 67 W. Va. L. Rev. 267 (1965).

II. ISSUES RELATING TO THE ROLE OF COUNSEL

The foregoing discussion indicates the variety of role definitions for counsel in juvenile court practice, and suggests several issues that must be addressed in any set of standards. In addition, there has been considerable dispute concerning the kinds of proceedings in which legal assistance should be made available and the persons entitled to such assistance. The critical issues presented can conveniently be grouped as follows:

A. Issues Related to Defining Counsel's Role

1. Should counsel act as an advocate for the lawful objectives chosen by his client, or should he adopt either a "guardianship" or a neutral approach to representation in juvenile court matters? How is counsel's role in juvenile cases generally defined?

2. To what extent should counsel depart from the usual techniques of representation in favor of the informal procedures customarily emphasized in juvenile court hearings?

3. Are communications between a juvenile court client and his attorney entitled to confidential treatment?

B. Issues Related to Provision of Legal Services

1. In what kinds of proceedings, and to whom, should counsel be made available in case of indigency?

2. At what stages of juvenile court proceedings should counsel be made available, and for what duration?

Obviously, these are broad issues and include within them subsidiary but important problems. The discussion below is an attempt to provide background for discussion and, frankly, in many cases, to set out my own views.

A. Issues Related to Defining Counsel's Role

1. The Lawyer's Role: generally. The central issue relating to the role of counsel concerns allocation of responsibility for determining respondent's posture in the case. As this memorandum earlier suggested, it has sometimes been proposed that attorneys adopt a "guardianship" definition of their function and sometimes that an amicus curiae approach be followed. Both of these diverge both in theory and in practical consequence from the role generally imputed to counsel in both civil and criminal matters: advocacy of the claims and lawful objectives chosen by his client. I am firmly persuaded that, except in a small minority of cases involving very young children, adoption of the traditional advocacy notion of counsel's role is required. This implies that it is ultimately for the client, and not his attorney, parents, or probation officer, to decide whether to admit or deny the charges, whether to exercise the privilege against self-incrimination, whether to oppose transfer of jurisdiction or demand it (where he has that option), and whether to enter into a consent decree or informal probationary arrangement. The reasons for taking this position are developed in some detail in the Introduction to the IJA/ABA Standards on the Defense Function, a copy of which is attached to this memorandum.

Adoption of an advocacy approach presumes, of course, that the client is competent to decide what lawful objective he may choose. As the General Introduction also indicates, I think that most clients in delinquency and supervision cases have sufficient understanding to meet that test. In a small number of these cases, and perhaps in many where counsel appears for the child subject to neglect or dependency proceedings, the client will not be able usefully to instruct his lawyer. Several methods of dealing with these cases suggest themselves:

(a) The lawyer can adopt a neutral position, restricting his activity to presenting and examining evidence material to the case.

(b) The lawyer may act as guardian ad litem, adopting the posture best suited to his client's apparent needs.

(c) A special procedure could be adopted for delinquency and PINS cases in which counsel enters a denial to the charges and requires the state to prove the charges. The lawyer would exercise all other rights ordinarily allocated to his client during the trial,

including the privilege against self-incrimination and the right to demand trial by jury, where available.

There is much to be said for (c), although it was rejected by the IJA-ABA Standards in favor of a combination of the first two.

2. Formality, Motions, and the Like. Traditional juvenile court theory strongly de-emphasized, indeed condemned, formality in procedure and, as a concomitant, rejected ordinary limitations on the reception of evidence. When attorneys did appear in juvenile cases, it was predictable that those well-entrenched preferences would be conveyed to counsel openly or covertly. There is considerable evidence that attorneys practicing in juvenile courts did in fact sense and accommodate their conduct to the demand for informality. Studies have repeatedly found that lawyers "avoid being legislative at all," fail to press generally appropriate evidentiary objections, and either avoid motions or make them more informally than would be the case in other proceedings. E.g., W. Stapleton & L. Teitelbaum, In Defense of Youth: A Study of the Role of Counsel in American Juvenile Courts 139-41 (1972); Platt & Friedman, "The Limits of Advocacy: Occupational Hazards in Juvenile Court," 116 U. Pa. L. Rev. 1156, 1177 (1968).

It is inevitable that insistance upon informality has sometimes and perhaps often led to compromise or waiver, both at trial and for purposes of appeal, of critical rights which the respondent was legitimately entitled to claim. My own view is that, while formalism for its own sake or for delay is obviously undesirable and in some circumstances unethical, counsel in juvenile court nevertheless should be charged with an express duty to make all motions, objections, or requests necessary to protect his client's rights and to do so in whatever form and at such time as will best serve his client's interests. Certain motions, for example, are usually and for good reason made in writing rather than orally and before rather than during trial. A lawyer appearing in a juvenile court case should, when the same circumstances present themselves, follow that procedure even though it is "formal." Similarly, good faith challenge to evidence should not be waived because the proceeding is "non-technical." If proof is arguably incompetent, irrelevant, hearsay or otherwise objectionable and is damaging to a client's interest in the matter, counsel should exercise the same professional judgment in deciding whether to seek its exclusion that is called for in criminal or civil representation. In addition, written motions, evidentiary objections and the like serve to define the postures of attorney and client with respect to the proceedings and the lawyer's independence from cooptative pressures, where these exist.

3. Confidentiality. There has been a degree of ambiguity concerning whether usual rules of confidentiality apply to lawyer-

client communications where the latter is a child. The National Council on Crime and Delinquency once stated that counsel is bound to reveal any facts "pointing to the need for treatment ... (in) fulfillment of the duty the attorney must assume, as an officer of the court." NCCD, Procedure and Evidence in Juvenile Courts 43 (1962). That some attorneys follow this view in practice by revealing confidences to the judge has been documented. Steinfeldt, Kerper & Friel, "The Impact of the Gault Decision in Texas," 20 Juv. Ct. Judges J. 154 (1969).

These deviations from the principle that communications between client and attorney should be protected from disclosure, while justified by some notions of traditional juvenile court theory, should be addressed and, in my opinion, firmly rejected. The guarantee of confidentiality is as important, both to the client and to the administration of justice, in juvenile as in criminal representation. Relaxation of rules of confidentiality would seriously compromise the child's readiness to enter into candid discussion of all relevant facts with his attorney and, to that extent, affects the right to counsel itself. Children, after all, often find themselves in the lawyer's office against their wishes and bring with them antagonism directed towards all adults. H. Freeman & H. Weihofen, Clinical Law Training 248 (1972). If counsel reveals a supposed duty to pass on what he learns without his client's consent, any further relationship must be artificial and, for all legitimate purposes, dysfunctional. Should counsel not advise his client in this regard, he practices a deception which reflects the gravest discredit on himself, on his profession, and on the system of justice generally. The lawyer's duty "to the court," as the Code of Professional Responsibility makes clear, is an integral part of his responsibility to the administration of justice; here, as elsewhere, it is discharged by vigorous representation of his client's interests.

B. Issues Related to Provision of Legal Services

1. Kinds of Proceedings and Parties Entitled to Representation

a. Delinquency Proceedings. That the respondent in delinquency proceedings is entitled to legal assistance cannot seriously be questioned after Gault. It may, however, also be suggested that the parents of a child subject to delinquency proceedings are entitled to something like party status and perhaps to legal assistance since they may, in the result, face substantial restriction on their custodial interest in their child. To recognize such a right in the parents would, however, present several real problems, among them: (1) confusion of proceedings where parent and child have divergent positions; (2) expense, particularly if appointed counsel is required; (3) administrative difficulties. The issue is, however, one that might be considered.

b. PINS Proceedings. Although Gault limited itself to provision of counsel for those charged with delinquency, many legislatures have provided the same right to children alleged to be in need of supervision. Although some courts have not been as willing, there seems no satisfactory ground for distinguishing delinquency from PINS cases in this respect. An adjudication of need for supervision ordinarily entails the possibility of removal from home or other substantial restrictions on the respondent's liberty, and there is the likelihood of social stigma as well. And, where the parent is formally or in fact the complainant, as is common in PINS matters, representation by an attorney will afford the only effective source of assistance for the child.

c. Child Protective Matters.

(1) Parents: Although neglect and dependency matters were traditionally considered "civil" and, therefore, provision of counsel was not thought necessary, recent decisional and statutory authority strongly suggest that persons faced with limitations on their custodial interest in their children are entitled to legal assistance. The latter view is illustrated in the opinion of the federal district court in Cleaver v. Wilcox, 40 U.S.L.W. 2658 (3/22/72):

> (W)hether the proceeding be labelled "civil" or "criminal," it is fundamentally unfair, and a denial of due process for the state to seek removal of the child from an indigent parent without according that parent the right to the assistance of court-appointed and compensated counsel. ... Since the state is the adversary ... there is a gross inherent imbalance of experience and expertise between the parties if the parties are not represented by counsel. The parent's interest in the liberty of the child, in his care and control, has long been recognized as a fundamental interest. ... Such an interest may not be curtailed without an opportunity to be heard, which in these circumstances includes the assistance of counsel.

The importance of neglect proceedings is further underscored by the observation that orders in such matters are commonly continued for long periods, often up to four years.

(2) Children. Independent representation for the child subject to proceedings that may affect his custody or status should be considered. While parties and their lawyers will ordinarily present many of the factual and legal propositions bearing on the existence of neglect and appropriate dispositional orders, their interests may not coincide with the child's. For a variety of reasons, certain factual propositions and placement alternatives may be presented only selectively or not at all. Thus, an independent

counsel or guardian for the juvenile should also be considered. Many statutes now so provide.

d. Custody Proceedings.

(1) Parents. It is uncommon, if not unknown, to provide representation without cost to parents involved in a custody dispute. Although this may seem inconsistent with the pronounced trend toward providing counsel for the respondent in child protective proceedings, there are important distinctions between neglect and custody cases. In the former, the state is seeking to limit a parent's custodial interest; in most other custody cases, the dispute is entirely between private parties -- usually the parents or a parent and some other relative. The state is not acting as an adversary in custody proceedings and there is therefore no reason to expect a great imbalance in resources or access to expertise between the contestants. Thus, the principal reasons for providing a parent with counsel in child protective matters do not operate in private custodial disputes.

(2) Children. While it is usually said that courts are not necessarily required to appoint a representative for children subject to custody proceedings, the power to do so is present either by statute or through the inherent equitable power of courts to protect the interests of children who may be affected by judicial action. The position of a minor in a custody action is much the same as that of a child who is allegedly neglected or dependent. While there may be an adversary hearing in which both formal parties are represented, a variety of circumstances may lead to incomplete presentation of the case. One spouse may, to take a single example, for his own reasons wish to avoid proving that his spouse is an unfit parent, and clearly the latter will not do so. Accordingly, it seems desirable routinely to appoint an attorney or guardian ad litem for the child, both to facilitate complete discovery and presentation of material evidence and, where the child is old enough, to put forth the child's view with regard to his custody.

e. Adoption/Termination of Parental Rights Proceedings. At least four candidates for provision of counsel can be identified: the child; the adoptive parents; the natural mother; and (particularly where unmarried) the natural father.

(1) Child: The child's position in adoption and termination of parental rights proceedings closely resembles his position in child protective and custody matters; the comments above apply here.

(2) Adoptive Parents. Counsel without cost is not customarily provided to parents seeking to adopt; indeed, they

are sometimes not accorded party status in the termination of parental rights hearings that often preceed an adoption. Since the state is not seeking to deprive the adoptive parents of an existing custodial interest, the usual reasons for providing counsel to indigents do not seem present.

(3) Natural Parents. The Supreme Court has recognized that parents have a constitutionally protected interest in the custody of their children. In Stanley v. Illinois, 405 U.S. 645 (1972), the Court held that an unwed father has the right to a hearing before his right to custody could be terminated by dependency proceedings. It has not yet held, however, that the parent is entitled to counsel without cost in the event of indigency in these cases. Since, however, termination of parental rights, either in a separate proceeding or in connection with adoption proceedings, involves not merely restriction but permanent termination of the natural parent's interest in the child, they should have at least the protections accorded parents in neglect and dependency matters. Many statutes so provide expressly, and a number of cases have so held.

f. Civil Commitment. Although the Supreme Court has not yet held that the respondent in civil commitment proceedings is entitled to counsel in case of indigency, a number of recent federal and state court decisions have come to that conclusion. E.g., In re Barnard, 455 F.2d 1370 (D.C.Cir. 1971); Heryford v. Parker, 396 F.2d 393 (10th Cir. 1968); Lessard v. Schmidt, 349 F. Supp. 1078 (E.D.Wis. 1972). After In re Gault, 387 U.S. 1 (1967), it seems clear that the characterizations of such matters as "civil" is not determinative of the right to counsel; the actual nature and consequences of proceedings rather than their labels are the critical elements for this purpose. Having regard to the effects of civil commitment, it seems necessary and appropriate to provide legal assistance for the respondent in such cases. It is also significant in this connection that at least one court has concluded that the right to counsel will not be satisfied by appointment of a guardian ad litem for the respondent, since "the guardian does not view his role as that of an adversary counsel and thus cannot take the place of counsel unless his role is restructured." Lessard v. Schmidt, 349 F. Supp. 1078, 1097 (E.D. Wis. 1972).

g. Post-Dispositional Proceedings. A variety of post-dispositional matters may also arise in which legal assistance may be thought necessary. Among these are: actions related to the child's place or course of treatment and probation or parole revocation proceedings. In these instances, there is increasing recognition that provision of counsel is desirable and, in some cases, may be constitutionally required. See Gagnon v. Scarpelli, 411 U.S. 788 (1973); People ex rel. Silbert v. Cohen, 29 N.Y.2d 12, 271 N.E. 2d 908 (1971).

2. Stages of Representation

a. Pre-Adjudicative Stages. The Gault decision required provision of counsel at adjudication, but did not address other stages of juvenile court proceedings. Most statutes are also silent as to whether counsel is required at preadjudicative stages. It cannot, in my view, seriously be doubted, however, that legal representation at the earliest opportunity is most important. There is near unanimous agreement that advice of counsel is necessary for the protection of the juvenile's rights after arrest. An attorney can also, through investigation and planning for alternatives to judicial treatment, contribute substantially to the diversion of cases at the intake stage which might otherwise be referred for court attention. In like manner, legal assistance may be valuable in determining both the propriety of and necessity for pre-trial detention.

b. Dispositional Hearings. With respect to postadjudicative hearings, it is obvious that, in juvenile as in adult cases, participation of counsel is usually crucial. At least one charge is sustained in the great majority of cases, vesting the judge with virtually unlimited discretion to choose among dispositional alternatives. The significance of these choices for the future of child and family cannot be overstated and counsel can usefully contribute to development of a dispositional plan as well as to presentation and examination of evidence material to the dispositional decision.

c. Appeal. While the Supreme Court has never had occasion to pass on the necessity of appellate counsel in juvenile proceedings, the importance of legal assistance at this stage seems obvious. A more difficult question is whether trial counsel should be relied on for appeal or new counsel should be appointed. While there is reason for preferring continued representation in some jurisdictions, substitution of counsel should seriously be considered where there exists an appellate defender system or a sizable pool of experienced private counsel for appeals.

Another troublesome issue involves withdrawal of appointed counsel on appeal. While the Supreme Court (in Anders v. California, 386 U.S. 738 (1967) and the ABA Criminal Justice Standards Project allow an attorney to seek leave to withdraw in "frivolous" cases, the wisdom of that approach has seriously been questioned. The procedure required for withdrawal in such cases demands as much work by counsel as if he pursued the appeal and has as well the effect of pitting lawyer against client. In view of the costs associated with this procedure, it seems desirable simply to disapprove withdrawal of appointed counsel on appeal and have the attorney put forth what arguments can professionally be advanced on his client's behalf. This view is taken by the IJA-ABA Standards Relating to the Role of Defense Counsel, § 10.3(c).

III. ATTACHMENT

Lee Teitelbaum, "General Introduction: Juvenile Representation and the Principle of Advocacy," Standards Relating to the Role of Defense Counsel in Juvenile Court Proceedings (Institute for Judicial Administration/American Bar Association Juvenile Justice Standards Project (Reporter's Draft -- not yet reviewed or approved by the Joint Commission; 1975).

There has always been sharp controversy regarding the propriety and role of counsel in juvenile court proceedings. Traditionally, cases involving children were considered "non-adversarial" with respect to both the relationship of the parties and the forms of procedure employed. As to the first, the child's interests in the proceeding were assumed to be identical with those claimed by the State, which sought only the former's welfare and not his punishment. There did not exist, accordingly, that adversity of interests among the parties which characterizes other civil or criminal proceedings. Given this premise, modes of trial designed for cases involving frankly conflicting interests seemed inappropriate. Juvenile hearings were viewed not as a contentious process but as a theraputic one. Informality and direct judge-child communication replaced demonstration by ordinary rules of procedure and evidence as vehicles for eliciting needed information concerning the respondent's circumstances and, as well, for imparting to children, or sometimes their parents, a sense of social responsibility.

It is not surprising that, in such a forum, legal representation was thought unnecessary and even undesirable. The participation of counsel, according to one standard treatise, "usually complicates the proceedings and serves neither the interest of the child nor the interests of justice. The better juvenile courts have been successful in discouraging the appearance of attorneys in most cases." H. Lou., Juvenile Courts in the United States 137-38 (1927). Indeed, most courts were successful in this endeavor; prior to 1967 it typically happened that fewer than ten percent--and often fewer than five percent--of those before juvenile tribunals received legal assistance. President's Commission on Law Enforcement and Administration of Criminal Justice, Task Force Report: Juvenile Delinquency and Youth Crime 82 (1967) (Task Force Report). Thus, despite significant judicial and statutory movement toward provision of counsel in a handful of jurisdictions, broad recognition of the importance of representation was not achieved until the Supreme Court held it a matter of constitutional right for delinquency proceedings.

With In re Gault, 387 U.S. 1 (1967), however, expressions of good intention and references to parens patriae could no longer justify denial of access to counsel. Legal assistance was necessary, the Court held, to allow the respondent to "cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of

the proceedings, and to ascertain whether he has a defense and to prepare and submit it." No less than an adult faced with felony charges, "The child requires the guiding hand of counsel at every stage in the proceedings against him." Id. at 36. Gault thereby established the importance of legal representation in delinquency matters, at the same time extending to respondents the privilege against self-incrimination and rights to notice of charges and confrontation of witnesses. It did not, however, entirely clarify the nature of juvenile court proceedings nor the role of counsel participating in them. Judges and others have pointed to the limits placed by the Court on its holding, and to the desire expressed there (and in subsequent decisions) for retention of the benevolent aspects of the juvenile justice system, as support for maintaining as far as possible the traditional non-adversary approach. See W. Stapleton & L. Teitelbaum, In Defense of Youth: A Study of the Role of Counsel in American Juvenile Courts 32-37 (1972).

The effort to accommodate traditional juvenile court theory and the requirement of counsel resulted for some in a fundamental redefinition of counsel's function. It has most often been suggested that attorneys for children abandon the sharply defined role of the advocate for a "guardianship" theory of representation. As a "guardian," counsel is primarily concerned with ascertaining and presenting the plea and program best calculated to serve the client's general welfare. E.g., Isaacs, "The Role of Counsel in Representing Minors in the New Family Court," 12 Buff. L. Rev. 501, 506-07 (1963). Others, including lawyers, judges and probation personnel, have urged an "amicus curiae" function, in which counsel acts largely as an intermediary between the participants and explains the significance of proceedings to his client. See Cayton, "Relationship of the Probation Officer and the Defense Attorney After Gault," 34 Fed. Prob. 8, 10 (1970). See also, Skoler & Tenney, "Attorney Representation in Juvenile Court," 4 J. Fam. L. 77 (1964); Stapleton & Teitelbaum, supra at 64-65. It is apparent that both guardianship and amicus curiae approaches involve radical modification of the rules governing a lawyer's professional role. At the very least, either places on counsel responsibility for decisions ordinarily allocated to the client. Whether to admit or contest the charges may become a matter to be determined by the attorney, perhaps in consultation with probation staff and parents, rather than by the respondent. E.g., Edelstein, "The Duties and Functions of the Law Guardian in the Family Court," 45 N.Y.S.B.J. 183, 84 (1973). Of the privilege against self-incrimination, it has been said that "A sensitive lawyer, like a sensitive judge or a sensitive social worker, knows when confession is good for the soul." Coxe, "Lawyers in Juvenile Court," 13 Crime & Delinq. 488, 490 (1967). Moreover, a lawyer who seeks to block presentation of complete and accurate information

to the court through, for example, a motion to suppress illegally obtained evidence can be accused of frustrating the court's proper functioning. See Kay & Segal, "The Role of the Attorney in Juvenile Court: A Non-Polar Approach," 61 Geo. L. J. 1401, 1412-13 (1973). It has further been suggested, and there is evidence that some practitioners agree, that counsel is affirmatively required to disclose any information, including that derived from a confidential communication, which bears on the child's need for treatment. See NCCD, Procedure and Evidence in Juvenile Court 43 (1962); Steinfeldt, Kerper & Friel, "The Impact of the Gault Decision in Texas," 20 Juv. Ct. Judges J. 154 (1969).

The Standards set forth in this volume generally reject both guardianship and amicus curiae definitions of counsel's role and require instead that attorneys in juvenile court assume those responsibilities for advocacy and counseling which obtain in other areas of representation. Accordingly, counsel's principal function is a derivative one; it lies in seeking the "lawful objectives of his client through all reasonably available means permitted by law." ABA, Code of Professional Responsibility, DR 7-101(A). Determination of those objectives--whether to admit or deny, to press or abandon a claim, and the like--is, within very broad limits, ultimately for the client whose interests will be affected by the proceeding. Counsel may, of course, urge one course or another, but may not properly arrogate the final decision to himself. Id., ED 7-7, 7-8. Once the objective has been chosen by the client, the lawyer is bound by that choice, and must take care to conduct all phases of his professional activity, even those largely committed to his discretion, in a manner consistent with the client's instructions in the matter. Id., EC 7-9.

Reliance on the generally accepted definitions of professional conduct is justified and indeed demanded by the purposes for which they were created. The lawyer's role, like any other, is at base a set of rules for behavior which are thought desirable because they advance certain values or goals. The norm that government officials should be elected, for example, is explained in terms of the "value" of democracy; put another way, the value "democracy" implies choice of elective rather than hereditary office. In the same way, norms of professional conduct for lawyers are designed to and are rational to the extent they advance fundamental goals of the legal process. These goals are generally shared, with certain variations, by every American justice system, including that of the juvenile court.

Perhaps the most important value of any justice system lies in providing a forum for enforcing those claims that the substantive law creates. Without such a forum, legal rights and benefits--together with the political and social principles they embody--are largely meaningless. The rules adopted by a justice system must therefore be such to facilitate the presentation of lawful issues for authoritative

resolution, and that value generally informs the rules of civil and criminal procedure. It is also central to the set of rules governing the conduct of counsel, as the Code of Professional Responsibility expressly recognizes:

> The duty of the lawyer, both to his client and to the legal system, is to represent his client zealously within the bounds of the law....The professional responsibility of the lawyer derives from his membership in a profession which has the duty of assisting members of the public to secure and protect available legal rights and benefits. In our government of laws and not men, each member of our society is entitled to have his conduct judged and regulated in accordance with the law; to seek any lawful objective through legally permissible means; and to present for adjudication any lawful claim, issue or defense.

EC 7-1 (emphasis supplied). This statement clearly indicates the relationship between the goals of the legal system and the rules that require counsel to seek the lawful objectives of his client rather than those he may think wise or proper. For lawyers systematically to do other than assist their clients in obtaining adjudication of a claim, issue or defense available under the law would, if legal counsel is at all necessary, effectively limit if not destroy that claim, issue or defense. If attorneys must, or perhaps even if they may, refuse to represent the guilty, then the guilty are not entitled to counsel in any practical sense; if attorneys must or even may refuse to participate in a denial on behalf of a defendent known to be guilty, then the latter has lost, for all practical purposes, the right to put the state to its burden of proof before conviction and sentence. This point is by no means novel; it is the view of Lord Brougham in the celebrated defense of Queen Caroline and of Erskine in his defense of Thomas Paine:

> From the moment that any advocate can be permitted to say that he will or will not stand between the Crown and the subject arraigned in the court where he daily sits to practice, from that moment the liberties of England are at an end. If the advocate refuses to defend from what he may think of the charge or of the defense, he assumes the character of the judge; nay, he assumes it before the hour of judgment; and in proportion to his rank and reputation, puts the heavy influence of perhaps a mistaken opinion into the scale against the accused, in whose favor the benevolent principle of English law makes all presumptions, and which commands the very judge to be his counsel.

Rex v. Paine (1792), 22 How. St. Tr. 412 (1815-1826). The United States Supreme Court has taken much the same position in holding that counsel on appeal must assume an advocacy function rather than serve merely as an amicus curiae, informing the court of his opinion concerning the merits of the appeal. Anders v. California, 386 U.S. 730, 741, 743 (1967); Ellis v. United States, 356 U.S. 674 (1958).

Identification of the attorney with his client's objectives also serves a second value shared by civil and criminal justice systems: the accurate determination of factual and legal propositions. The common mechanism used for implementing this goal is the adversary mode of proof, the "competitive system in the administration of the law." Cheatham, "The Lawyer's Role and Surroundings," 25 Rocky Mtn. L. Rev. 405, 409 (1960). In both systems, responsibility is placed on the parties themselves for investigation, development and presentation of issues of law and fact in the belief that, because of their respective self-interest, they will have the strongest motivation to bring all material evidence and argument to the court's attention. The resulting demonstration will, it is assumed throughout our legal process, best enable judge or jury to determine the truth of the positions asserted. See E. Morgan, Some Problems of Proof Under the Anglo-American System of Litigation 1 (1965); Report of the Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice 11 (1963). Since the adversary system relies on partisan presentation to inform the trier of fact, it is rational and indeed necessary to have rules of professional behavior associating counsel's conduct with the interest of his client. To the extent that the advocate fails to pursue his client's interests fully and effectively, "the adversary system is not being fully utilized." Thode, "The Ethical Standard for the Advocate," 39 Texas L. Rev. 575, 588-89 (1961). As the Supreme Court observed with respect to appellate matters, a procedure in which counsel acts "merely as an amicus curiae does not provide "that full consideration and resolution of the matter as is obtained when counsel is acting in (an advocacy) capacity." Anders v. California, 386 U.S. 730, 743 (1967).

These political and instrumental goals, and hence the rules they generate, are as important to juvenile court proceedings as to other civil or criminal matters. While the juvenile system retains a number of distinctive and significant features, it cannot still be maintained that a party facing deprivation of liberty has no cognizable claim under law apart from those asserted by the state on his behalf. Nor, concomitantly, is it true that adversarial methods of proof are inappropriate to these proceedings. The first premise has, by necessary implication, been rejected in favor of recognition of a privilege in the respondent to withhold cooperation in proceedings that may affect his liberty. It is important in this connection that the Supreme Court extended the privilege against self-incrimination to juveniles facing delinquency charges, not only from concern

for "untrustworthy" confessions, but because children, like adults, may claim a measure of distance from the state in actions which may result, however benevolent the motivation, in a substantial restriction of freedom. As Mr. Justice Fortas observed:

> (T)he roots of the privilege against self-incrimination tap the basic stream or religious and political principle, because the privilege reflects the limits of the individual's attornment to the State and--in a philosophical sense--insists upon the equality of the individual and the State....One of its purposes is to prevent the State, whether by force or by psychological domination, from overcoming the mind and will of the person under investigation and depriving him of the freedom to decide whether to assist the State in securing his conviction.

In re Gault, 387 U.S. 1, 47 (1967). The respondent's right to decide whether he will assist the state necessarily assumes that he is entitled to define his own interests in the proceeding and to do so in a manner different than that urged by the state. The Court has also rejected the notion that a youthful respondent, by reason of his "dependent" status, generally has no right to liberty. It referred in Gault, but without approval, to the proposition that "a child, unlike an adult, has a right 'not to liberty, but to custody'" and repeatedly emphasized the gravity of intervention from the child's perspective. In re Winship, 397 U.S. 358 (1970), the Court further recognized that, in delinquency matters as in prosecutions for crime, "The accused has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by conviction." Id. at 365-66. And, most recently, the Supreme Court has held that both the function and the consequences of delinquency proceedings are virtually identical to those characterizing criminal prosecutions. Each system is "designed 'to vindicate (the) very vital interest in enforcement of criminal laws,'" Breed v. Jones, 43 U.S.L.W. 4644, 4647-48 (1975), a goal clearly independent of that held by the accused. Nor, the Court reaffirmed, can any useful distinction be drawn between the consequences of delinquency matters and those associated with the criminal process. "The fact 'that the purpose of (juvenile court) commitment is rehabilitative and not punitive (does not) change its nature....The rehabilitative goals of the system are admirable, but they do not change the drastic nature of the action taken. Incarceration of adults is also intended to produce rehabilitation.'" Id. at 4647, n. 12, quoting Fain v. Duff, 488 F.2d 218, 225 (5th Cir. 1973). See also, In re Gault, 387 U.S. 1, 50 (1967); In re Winship, 397 U.S. 358, 367 (1970).

Once the traditional identification of parties to juvenile proceedings is impeached, the related notion--that "adversarial" proced-

ure ought be avoided in a noncontentious forum--is also flawed in its premise. It should be added that, even on its own terms, juvenile court disapproval of adversarial techniques found slight justification. Initially, it is doubtful that references to the "nonadversary" character of the court had much to do with the manner of proof; rather, the phrase usually reflected the notion of identity of interests. More important, there is no reliable evidence that use of a non-adversarial procedure achieves greater accuracy than the method which American courts generally employ. Indeed, the Supreme Court concluded that reliance on informal and non-contentious practice resulted in "unfairness to individuals and inadequate or inaccurate findings of fact and prescriptions of remedy." In re Gault, 387 U.S. 1, 18-20 (1967). Nor, for that matter, is there good reason to believe that continental courts, which typically employ a modified inquisitorial mode of proof, systematically reach more accurate or just results than do Anglo-American tribunals. Accordingly, abandonment of the traditional role for counsel cannot be justified by reference to a goal of increased fairness or an interest in reaching right results.

While most of the decisional law concerning rights of persons before the juvenile court is concerned with delinquency proceedings, the same rationales apply to the role of counsel in other juvenile court matters. The respondent in need of supervision cases, as in prosecutions for crime or delinquency, is subject to deprivation of liberty, including institutional commitment, for what may be the duration of his minority. And, while stigmatization may be of a different or less aggravated kind, it presumably still exists since a disadvantaging label is applied to the child as a result of the adjudication. In child protective proceedings as well, the respondent--here the parent or guardian--faces a grave penalty in the substantial restriction of his or her constitutionally recognized interest in the custody of a child. See Stanley v. Illinois, 405 U.S. 645 (1972); In re B, 30 N.Y.2d 352, 334 N.Y.S.2d 133 (1972). Again, as with delinquency and supervision matters, it is little more than word play to insist that the interests of state and respondent--one seeking to take custody and the other to maintain it--are coincidental rather than frankly adverse. Nor, of course, could it be urged that accuracy in factual and legal decisions is less important in these areas.

THE RELEVANCE OF THE CLIENT'S YOUTH

It has sometimes been suggested that all or most of a juvenile court lawyer's clientele is incompetent to instruct counsel in any usual sense and that the latter must, therefore, usually act as guardian or amicus curiae. The proponents of this view often tend, however, to equate competence with capacity to weigh accurately all immediate and remote benefits or costs associated with the available options. In representing adults, wisdom of this kind is not required; it is ordinarily enough that the client understand the nature and

purposes of the proceedings, its general consequences, and be able to formulate his desires concerning the proceeding with some degree of clarity. Most adolescents can meet this standard, and more ought not be required of them. To do so would, in effect, reintroduce the identification of state and child by imposing on the respondent an "objective" definition of his interests.

It is, of course, true that "The responsibilities of a lawyer may vary according to the intelligence, experience, mental condition or age of a client...or the nature of the particular proceeding." ABA, Code of Professional Responsibility, EC 7-11. Counsel will sometimes be required, by reason of his client's youth and inexperience, to take special pains in explaining the nature and potential results of the action and to investigate formal and informal dispositional alternatives in his client's interests. See, e.g., §§ 6.2, 8.1 and 9.3, infra. And, particularly where he represents a very young client (ordinarily but not always in connection with a child protective, custody or adoption matter), it will in some cases happen that the client is incapable of rational consideration regarding the proceeding. Where this is true, the attorney may be required to abandon his role as an advocate. See § 3.1(b), infra. However, the occasions for doing so are rare--particularly in delinquency and supervision cases--and may not properly be extended through manipulation of the general standard for competence.

THE LAWYER AS COUNSELOR. Adoption of an advocacy role for purposes of juvenile court proceedings does not imply that the lawyer should limit his concern or activity to the legal requirements of those proceedings. He not only may, but ordinarily should, be prepared to assume responsiblity for counseling his client and, in some cases, the client's family with respect to legal and non-legal matters independent of pending or contemplated litigation.

The existence of such a role for an attorney has long been recognized in a variety of kinds of practice. In commercial law, it has been said that "Counseling, with the idea of avoiding future controversies and litigation, is the lawyer's most useful role." R. Braucher & A. Sutherland, Jr., Commercial Transactions: Text--Cases--Problems 37 (3rd ed. 1964). Tax counseling is thought an important device to "improve the tax morality of the community." Hellerstein, "Ethical Problems in Office Counselling," 8 Tax L. Rev. 4. 9 (1952). In matrimonial cases, it has increasingly been emphasized, lawyers must be prepared to assume responsibility for guidance beyond the strict legal requirements of processing the action and negotiating property or custody agreements. C. Foote, R. Levy & F. Sander, Cases and Materials on Family Law 8-10 (1966); Watson, "The Lawyer as Counselor," 5 J. Fam. L. 7 (1965).

Recognition of the attorney's function as counselor seems particularly appropriate for juvenile court representation. In most instances,

neither the client nor his family will likely be familiar with the juvenile court, its procedures, goals or powers. It will, ordinarily, fall to the lawyer to understand and allay their spoken and unspoken fears about the situation in which they find themselves. H. Freeman & H. Weihofen, Clinical Law Training 454 (1972). In addition to his capacity as interpreter of specific procedures and rules the attorney may also become "the first law figure who has performed a helpful function" for the client. Paulsen, "The Expanding Horizons of Legal Services: II, "67 W. Va. L. Rev. 267, 276 (1965). As such, counsel has a unique opportunity to explain legal and social propositions in an acceptable fashion to clients whose feelings are often colored by hostility to authoritarian figures and rules. He should also attempt to ascertain whether non-legal services are needed by his client and his client's family and to assist them in taking advantage of such services if they are available. Performance of these duties will not, it should be emphasized, involve compromise of the obligation to advocate his client's interests before the court, so long as the distinction between counseling and ultimate determination of interests in the matter is observed. See ABA, Code of Professional Responsibility, EC 7-3.

IV. TASK FORCE STANDARDS AND RATIONALE

The Task Force addressed the issues raised in this memorandum in the standards in Chapter 16: Defense--The Child Advocate.

A. Issues Related to Defining Counsel's Role

The Task Force outlined it's views on the general role of counsel in the family court in Standard 16.2.

> The principal duty of an attorney in family court matters is to represent zealously a client's legitimate interests under the law. In doing so, it is appropriate and desirable for a lawyer to advise the client as to the legal and social consequences of any decision the client might make, as well as to advise the client to seek the counsel of parents or others in making that decision. However, the ultimate responsibility for making any decision that determines the client's interests within the bounds of the law remains with the client.

The Commentary elaborates on the Standard as follows:

> The attorney may counsel the client concerning both legal and non-legal considerations in the case... (For example, the attorney may) ascertain whether the client or the family could benefit from non-legal services.
>
> Advice and counseling on these matters, it should be emphasized, are not inconsistent with the attorney's primary responsibility to advocate a client's interests in pending legal proceedings. But the line between counseling and decision-making must be respected. For example, it is improper for an attorney to present the alternatives so as to effectively compel the choice of one of them.

The Task Force was also cognizant of the frequent problems of communication between lawyers and juveniles, especially poor, minority-group youths. To provide guidance on this subject, the Task Force formulated Standard 16.12.

> In communicating with a youthful client or witness, the lawyer should accommodate his expectations to the age and background of his client. It is proper for the lawyer to question the credibility of his client's statements or those of any other witness.

> However, he may not suggest, expressly or by implication, that his client or other witness prepare or give, on oath or to the lawyer, a version of the facts which is in any respect untruthful, nor may he intimate that the client should be less than candid in revealing material facts to the attorney.

Cases involving incompetent clients were seen as raising special problems. The Task Force addressed these situations in Standard 16.3 on The Role of Counsel for the Incompetent Client, and Standard 16.4 on The Role of Counsel Appointed Guardian Ad Litem.

> Standard 16.3: If an attorney finds, after interview and other investigation, that the client cannot understand the nature and consequences of the proceedings affecting him and is, therefore, unable rationally to determine his own interests in that proceeding, the attorney should promptly bring that circumstance to the court's attention and ask that a guardian ad litem be appointed on the client's behalf.

> Standard 16.4: A lawyer appointed to serve as guardian at litem for a person subject to family court proceedings should inquire thoroughly into all circumstances that a careful and competent person in the ward's position would consider in determining his interests in the proceeding. When the client is the respondent, the guardian should ordinarily require proof of the facts necessary to sustain jurisdiction and, if jurisdiction is sustained, take the position requiring the least intrusive intervention justified by the child's circumstances. In representing a child in Endangered Child, custody or adoption proceedings, the guardian may limit his activity to presentation and examination of material evidence or may adopt the position requiring the least intrusive intervention justified by the child's circumstances.

As noted in the Introduction to Chapter 16, these two Standards recognize that,

> If (the client) cannot understand the nature and consequences of the proceedings, he cannot take the initial step necessary for proper functioning of the attorney-client relationship, i.e., determining his own interests in the proceedings and communicating this to the attorney. These Standards require the lawyer in such a situation to bring this circumstance to the family court's attention and request that a guardian ad litem be appointed for the client.

In general, then, while the Task Force recognized that a juvenile client's immaturity may well justify special care in lawyer-client communications, it did not believe that the juvenile's age alone should create any presumption that he is incompetent to make the necessary decisions in legal proceedings. Only cases of demonstrated incompetency were seen as justifying the appointment of a guardian to speak on the client's behalf.

B. Issues Related to Provision of Legal Services

1. Kinds of Proceedings and Parties Entitled to Representation

The Task Force addressed the child's right to representation in Standard 16.5.

> Legal representation, without cost if necessary, should be made available to any child whose liberty, custody, or status may be affected by delinquency, Families with Service Needs, Endangered Child, child custody, termination of parental rights or civil commitment proceedings.

The related issue of the criteria for judging a decision to waive the right to counsel in delinquency proceedings is considered in Standard 16.1.

> At every stage of delinquency proceedings the juvenile should be represented by a lawyer. If a juvenile who has not consulted a lawyer indicates his intention to waive the assistance of counsel, a lawyer should be provided to consult with the juvenile and his parents. The court should not accept a waiver of counsel unless it determines after thorough inquiry that the juvenile has conferred at least once with a lawyer, and is waiving the right competently, voluntarily and with a full understanding of the consequences.

The Task Force viewed the right to counsel as essential to securing the juvenile's other rights under the law. Therefore, these standards are designed to insure a meaningful right to legal representation when the juvenile's liberty, custody or status may be affected by family court proceedings. As noted in the Introduction to Chapter 16,

> The standards do away with characterizations of such matters as "civil" as a determinative factor in providing counsel, recognizing that the actual nature and consequences of such proceedings, rather than their traditional labels, are the critical elements in determining the availability of counsel.

The Task Force focused on the issue of representation of parents in Standard 16.6.

> *The parent, guardian, or custodian of a child alleged* to be an endangered child should have the right to legal assistance, without cost if necessary, throughout those proceedings. The parent, guardian or custodian of a child who is alleged to be delinquent or the parent, guardian or custodian involved in a Families with Service Needs proceeding should have the right to legal counsel, without cost if necessary, at the dispositional stage of those proceedings when it appears that he will be required to participate affirmatively in the dispositional order or plan.

This standard recognizes that the parents' interests vary, depending on the nature of the proceeding. In general, the Task Force felt that representation of parents is appropriate where their acts or conduct is directly at issue. On the other hand, where the parents' behavior is not directly at issue, it felt that the provision of counsel for the parents would unduly complicate the proceedings.

2. Stages of Representation

The Task Force outlined its views on the appropriate stages of representation in family court proceedings in Standard 16.7.

> Except as provided in Standard 16.6, legal representation should be made available at the earliest feasible stage of family court proceedings. Each state should adopt procedures whereby counsel can at least be appointed:
>
> 1. At the intake stage where the juvenile is not detained;
>
> 2. At the judicial detention hearing stage where the child has been removed from the home.
>
> Legal representation should continue throughout the family court proceedings and, if necessary, through post-dispositional matters that may change the level of deprivation of liberty or the kind or amount of treatment received by the juvenile, such as proceedings to determine or change the place or course of treatment or to revoke probation or parole.

This standard is designed to insure the provision of counsel at the earliest feasible stage in the proceedings. This was seen as important not only to insure adequate preparation in cases that are fully adjudicated, but also because decisions having a significant impact

on the juvenile's liberty or status are often made in the preliminary stages. As noted in the Commentary,

> The need for representation at the initial stages of family court proceedings is basic to the decision to provide counsel at all.

In addition,

> With minors, the concern for providing legal services at post-dispositional stages must be at least as great as for adults. This is true not only because of their youth and inexperience, but also because the necessity for unquestioning acceptance of adult decisions has systematically been impressed on them.

APPENDIX A

PETITIONS

ISSUE I: SHOULD A COMPLAINANT HAVE AN ABSOLUTE RIGHT TO HAVE A FORMAL PETITION FILED, AS SOME STATES PRESENTLY PROVIDE?

The clear trend is to deny a complainant this absolute right but to provide for an appeal to a prosecutor (or judge) where the intake decision-maker has rejected a petition.

ISSUE 2: WHO SHALL OR SHALL NOT BE AUTHORIZED TO SIGN A PETITION?

The Uniform Act (§ 20) directs that petitions may be made by any person, including a law enforcement officer, who has knowledge, etc. New Mexico provides for petitioning by any person who has knowledge, etc. Florida (1975) exclusively authorizes a petition by the state attorney, assistant state's attorney or petitioner.

New Mexico further states (13-14-16) that unless authorized by rule of the court, a probation officer may not sign a petition except with respect to a child who is on probation or otherwise under the supervision of the probation officer.

A further issue is the logistics of getting the signer into the office to sign a petition following the preliminary investigation.

NOTE: Possibly, a parent or guardian should be prohibited from signing the petition. A number of courts, in practice, prohibit a probation officer from signing. The trend is toward the prosecutor as petitioner, though such a standard bears some relationship to Task Force resolution of the intake decisional authority. Retaining the intake decision authority with an intake officer could still allow for the prosecutor as the petition. Police officers commonly sign petitions.

ISSUE 3: WHO SHOULD DIRECT THE PREPARATION OF THE PETITION AND WHAT AGENCY'S STAFF MEMBER SHOULD ACTUALLY PREPARE THE PETITION?

This also relates to the Task Force decision concerning the intake process. Probably the general principle should be that the petition should be typewritten by an employee of the agency or department which holds the intake decision power. For example, if the prosecutor holds this power, clerical staff preparing the petition should be employees of the prosecutor and not of the court or probation department. The District of Columbia statute provides that each petition shall be prepared by Corporation Counsel.

ISSUE 4: SHOULD THE DELINQUENCY PETITION CITE THE SPECIFIC STATUTES OR ORDINANCES ALLEGEDLY VIOLATED?

Both statutory and decisional law are clearly moving in the direction of requiring specific citation.

ISSUE 5: SHOULD THE JURISDICTIONAL REQUIREMENT REFLECTED IN THE CONTENTS OF THE PETITION REQUIRE THAT THE CHILD (IN ADDITION TO VIOLATING THE LAW OR IN NEED OF SUPERVISION) PROVISION ALSO BE IN NEED OF TREATMENT, CARE, OR REHABILITATION?

This is both a jurisdictional issue and a petition-content issue. The petition standard should reflect Task Force thinking as to the jurisdictional issue. A number of states include such a provision, probably stimulated by the Uniform Act (1968) which included this and which added in commentary that such an allegation is necessary "and, in the light of the Gault case, must be established if the proceedings are to retain their non-criminal character."

However, the District of Columbia statute sets forth that in the absence of evidence to the contrary, a finding of a law violation is sufficient to sustain a finding of in need of care or rehabilitation.

Perhaps this jurisdictional requirement is useful as authority for a judge, who considers a certain law violation trivial or out of character with a child, to dismiss a case without requiring probation or supervision. A counterargument would be that if a youth is not in such need, his charge should have been screened out of the system at intake.

TASK FORCE STANDARDS AND RATIONALE

To insure that resorting to formal judicial proceedings is limited to those cases in which it is truly appropriate, Standard 15.13 specifies that after complaints are screened by intake personnel, the decision on filing petitions is to be made by the Family Court Prosecutor. Standard 15.15 discusses the appropriate form and content of petitions in considerable detail.

> The petition filed by the Family Court Prosecutor with the family court to initiate the formal adjudicatory process should be in writing and signed by the Family Court Prosecutor to certify that he has read the petition and that to the best of his knowledge, information and belief it is true. It should set forth facts sufficient to allege the subject matter and personal jurisdiction of the court, and, where the basis of the proceeding is a law violation, should set forth the specific law alleged to have been violated by the juvenile. It should set forth facts sufficient to inform the juvenile of the acts or omissions he is alleged to have committed.
>
> The petition should contain the following separate parts:
>
> 1. The name, address and date of birth of the juvenile;
> 2. The name and address of the juvenile's parents or guardian;
> 3. The date, time, manner, and place of the acts alleged as the basis of the court's jurisdiction;
> 4. The citation to the section of the Family Court Act relied upon for jurisdiction;
> 5. The citation of the federal, state or local law or ordinance, if any, alleged to have been violated by the juvenile;
> 6. A brief statement of the adjudicatory relief sought.

The foregoing is intended to give the juvenile thorough and complete notice of the charges against him (see also Standard 12.5). The Commentary to Standard 15.15 indicates,

> (T)he Task Force has chosen not to include allegations of a child's need for treatment, care or rehabilitation, on the basis that this should be left to the dispositional aspect of the proceedings.

APPENDIX B

COMPLETE LISTING OF COMPARATIVE ANALYSES

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